Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

LUCILLE MITZY BOSCO ROGERS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JOERENE INGRAM, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the existence of a state homestead law exempts real property from forced sale under the Internal Revenue Code to satisfy the delinquent federal tax liability of one of the owners of a homestead, where the other owner occupying the homestead is not a delinquent taxpayer and is characterized by state law as having an estate in land.

2. Whether, in a foreclosure action brought by the United States under Section 7403(c) of the Internal Revenue Code (26 U.S.C.), a federal court is empowered to order the sale of homestead real property to enforce a federal tax lien that attaches to a delinquent taxpayer's interest in the property, where there is another owner occupying the homestead who is not a delinquent taxpayer.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The district court did not issue an opinion in either case. The opinion of the court of appeals in *Rogers* (App. A, *infra*, 1a-24a) is reported at 649 F.2d 1117.

The court's opinion in *Ingram* (App. B, *infra*, 25a-32a) is reported at 649 F.2d 1128.

JURISDICTION

The judgments of the court of appeals in both cases were entered on July 6, 1981 (Apps. C and D, *infra*, 33a-36a). On September 28, 1981, the court of appeals denied the government's petitions for rehearing with suggestions for rehearing en banc (App. E and F, *infra*, 37a-39a). By orders dated December 18 and January 18, 1982, Justice White extended the time within which petitions for writs of certiorari could be filed in these cases to February 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

Sections 6334 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C.), and Section 301.6334-1(c) of the Treasury Regulations on Procedure and Administration (26 C.F.R.), are set forth in App. G, *infra*, 41a-44a.

STATEMENT

1. *Rogers.* On October 24, 1937, Philip S. Bosco and respondent Lucille Mitzi Bosco Rodgers[1] were married. In 1955, they obtained as community property the residential real property involved in this suit, which they occupied with their children as their homestead (App. A, *infra*, 1a-2a). In 1971 and 1972, the Internal Revenue Service issued assessments totaling $927,284.79 for federal wagering taxes, penalties and interest, against Philip for the taxable years

[1] Respondent's name was inadvertently misspelled in the caption of the case.

1966 through 1971 (App. A, *infra*, 2a). These taxes remained unpaid at the time of Philip's death on November 6, 1974 (*ibid.*). After Philip's death, respondent continued to occupy the property as her homestead. The couple's children have married and have left their parents' home. Respondent thereafter remarried and now occupies the homestead property with her present husband. At the time this suit was filed, respondent held no property belonging to Philip other than the homestead property and certain personal property having value less than $500 (*ibid.*).

The government instituted this suit in the United States District Court for the Northern District of Texas against respondent and Philip's son, daughter and executor for the purposes of reducing to judgment the assessments against Philip, enforcing the tax liens against any property belonging to him and obtaining a deficiency judgment in the amount of any unsatisfied part of the liability (App. A, *infra*, 2a). In response, the defendants moved for summary judgment on the ground that they held no property belonging to Philip other than certain personal property of limited value and the real property which respondent claimed as a homestead (App. A, *infra*, 2a-3a). The district court granted summary judgment in favor of respondents (App. A, *infra*, 3a).

The court of appeals affirmed (App. A, *infra*, 1a-24a).[2] In so holding, the court acknowledged (App. A, *infra*, 6a), that nonhomestead community property may be reached in its entirety by the government in order to satisfy the tax debts of either spouse.

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[2] The district court also awarded respondents attorney's fees of $3,000 (App. A, *infra*, 3a, 23a-24a). However, the court of appeals reversed this aspect of the district court's judgment, concluding "that the district court acted outside of its discretion in awarding attorney's fees to [respondents]" (*id.* at 24a). The attorney's fee question is not before the Court.

It further acknowledged that under Section 6334(a) and (c), "the homestead interest of a *taxpayer* spouse, *i.e.*, that of one who himself has tax liability, clearly cannot by itself defeat a federal tax lien" (App. A, *infra*, 7a; emphasis in original). Those provisions of the Internal Revenue Code enumerate particular items of property that are exempt from levy and further stipulate that no other property shall be exempt from levy. The court concluded that "the federal tax liens in this case clearly attached to the deceased taxpayer spouse's interest in the realty claimed as a homestead" (*id.* at 8a). As a result, the court acknowledged that the tax liens "could be executed against that interest if his was the only interest in the homestead, or if *both* spouses were delinquent taxpayers and the liens had attached to each spouse's interest in the homestead" (*ibid.*; emphasis in original).

The court, however, resisted the conclusion that the tax liens may be foreclosed or enforced against the taxpayer spouse's interest in realty claimed as a homestead when the other spouse, having an equal interest in the homestead property, has no tax liability. It noted that the authorities were divided on the question whether the government may foreclose its tax lien on a taxpayer spouse's homestead interest, if a nontaxpayer spouse had an interest in the homestead property. The Ninth[3] and Eighth[4] Circuits had held that the government could foreclose its tax lien in these circumstances.

But the court below followed the opposite conclusion reached in *United States* v. *Hershberger*, 475

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[3] *United States* v. *Heffron*, 158 F.2d 657 (9th Cir.), cert. denied, 331 U.S. 831 (1947).

[4] *United States* v. *Heasley*, 283 F.2d 422 (8th Cir. 1960); *Herndon* v. *United States*, 501 F.2d 1219 (8th Cir. 1974).

F.2d 677 (10th Cir. 1973). There, the Tenth Circuit reasoned that if a homestead is merely an exemption from general creditors under state law, the nontaxpayer spouse's interest will not prevent execution of a federal tax lien on the taxpayer spouse's interest. If, on the other hand, state law characterizes a homestead interest as an estate in land, as it did in *Hershberger*, the Tenth Circuit held that a federal tax lien may not be foreclosed against the homestead as long as the nontaxpayer spouse's interest exists under state law (App. A, *infra*, 9a-11a). Since the court below determined that a Texas homestead interest is an undivided, vested estate in land, it similarly ruled that the government could not foreclose its federal tax liens on the homestead interest of Philip as long as respondent, the nontaxpayer spouse, maintained her interest in the homestead (*id.* at 19a-23a).

In support of its ruling, the court below relied on its prior decisions holding that in a foreclosure action brought by the government under Section 7403 of the Code, the federal courts cannot require the sale of property to foreclose a federal tax lien that attaches to the interest of only one of the owners of the property (App. A, *infra*, 14a-17a). The court, however, acknowledged that four other circuits have taken the opposite view, holding that the courts should, at the behest of the government, order the sale of the entire jointly held property in order to satisfy the tax liability of one of the joint tenants (*id.* at 16a n.12).

2. *Ingram.* During their marriage, Donald and respondent Joerene Ingram acquired as community property, a residence located in Dallas, Texas, and claimed this property as their homestead under Texas law. In 1972 and 1973, the Internal Revenue Service made assessments against Donald Ingram under Section 6672 of the Code relating to unpaid taxes with-

held from employees' wages of the Dallas Auto Damage Appraisers, Inc., of which Donald Ingram was president. The tax liabilities related to the period from the first quarter of 1971 through the second quarter of 1972. After payments on account of these liabilities were made, there remained unpaid $9,330.51, plus interest. In addition, in 1973, an assessment was made in the amount of $283.33, plus interest, against Donald and Joerene Ingram relating to their joint income tax liability for 1971. This amount remains unpaid (App. B, *infra*, 26a).

On March 19, 1975, at which time the Ingrams were seeking a divorce, their residence was destroyed by fire (App. B, *infra*, 26a).[5] In connection with their divorce proceedings, they entered into a property settlement agreement in which they agreed that Donald would convey his interest in the real property to respondent. After the property was conveyed to Laurel Bates, as trustee for respondent, attempts to sell the property failed. Respondent also received notice from the City of Dallas Department of Housing and Urban Rehabilitation that unless she complied with local ordinances, the remains of the resi-

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[5] The home was insured and the proceeds of the fire insurance policy, approximately $50,000, were deposited into the registry of the Domestic Relations Court where their divorce proceedings were pending. Joerene and Donald Ingram entered into a property settlement agreement, which provided, *inter alia*, that the parties would divide the proceeds equally and that Donald would convey his interest in the real property to Joerene in exchange for $1,500 to be paid from the proceeds of the insurance policy (App. B, *infra*, 26a-27a).

In addition, Joerene and Donald agreed that they would file separate income tax returns for 1974, that Donald would pay any income tax on joint income for 1974, and that he would "hold [his] Wife harmless for any deficiencies or assessments for the years 1971 through 1973" (App. B, *infra*, 27a).

dence would be demolished. Following a hearing, notice requiring demolition was given. Respondent and Laurel Bates thereupon instituted this action in state court to quiet title to the property, to remove the liens that encumbered it, and to enjoin demolition of the improvements located on the property (App. B, *infra*, 27a).

The suit was removed to the United States District Court for the Northern District of Texas. Thereafter, the United States filed a counterclaim against respondent and Donald Ingram, who was added as a defendant, seeking foreclosure of its tax liens for the sole liability of Donald Ingram for unpaid withholding taxes and for the joint liability of Donald and Joerene Ingram for unpaid income taxes. Respondent sought summary judgment urging that the property was insulated from creditors' claims because it was her homestead. Pursuant to a stipulation of the parties, the property was sold and the proceeds (approximately $16,250) were deposited into the registry of the district court, pending the outcome of the suit.[6] The government opposed respondent's motion for summary judgment on the ground that there was a material question of fact concerning whether she had abandoned the homestead. In addition, the government filed a cross-motion for summary judgment on its counterclaim on the ground that the state homestead exemption was ineffective against the federal tax liens.[7] The district court granted the govern-

[6] The parties agreed that their rights, claims, and priorities would be determined as if the sale had not taken place, and that the proceeds would be divided according to their respective interests (see App. B, *infra*, 28a).

[7] The government also sought summary judgment on its cross claims against the competing creditors on the ground

ment's motion for summary judgment (App. B, *infra*, 28a-29a).

On the authority of its decision in *Rogers*,[8] the court of appeals reversed. It held that if respondent maintained her homestead interest in the property, the government was not entitled to enforce its tax lien based on Donald Ingram's withholding tax liability. The court, however, affirmed the judgment insofar as the district court had permitted the government to satisfy its claim relating to the joint income tax liability from the proceeds of sale. An issue of fact remained as to whether respondent continued to maintain her interest in the property as a homestead which she could assert against a levy by the Internal Revenue Service for the purpose of satisfying her former husband's federal withholding tax liability. The court therefore remanded the case for that determination (App. B, *infra*, 31a-32a).

REASONS FOR GRANTING THE PETITION

In holding that a state homestead law exempts real property from forced sale to satisfy the delinquent federal tax liabilities of one of the owners, where the other owner occupying the homestead is not a delinquent taxpayer and is characterized by state law as having an estate in land, the court of appeals acknowledged (App. A, *infra*, 9a-10a) that its decision conflicted with those of two other circuits in *United States* v. *Heffron*, 158 F.2d 657 (9th Cir.), cert. denied, 331 U.S. 831 (1947); *United States* v. *Heasley*, 283 F.2d 422 (8th Cir. 1960); *Herndon* v. *United States*, 501 F.2d 1219 (8th Cir. 1974). The

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that the tax liens had priority over their interests (App. B, *infra*, 28a-29a).

[8] The court of appeals consolidated the case for oral argument with *Rogers* (App. A, *infra*, 3a n.3).

decision below, however, followed the opposite conclusion of the Tenth Circuit in *United States* v. *Hershberger*, 475 F.2d 677 (1973). Accord: *Jones* v. *Kemp*, 144 F.2d 478, 480 (10th Cir. 1944); *Tillery* v. *Parks*, 630 F.2d 775 (10th Cir. 1980).

Moreover, the court of appeals' ruling that in a suit brought by the government under 26 U.S.C. 7403(c), a federal court may not order the sale of real property to foreclose an unquestionably valid tax lien that attaches to a delinquent taxpayer's interest in property, where there is another owner who is not a delinquent taxpayer, concededly conflicts with the decisions of four other circuits upholding the government's right to foreclose its tax liens on jointly held property to satisfy the tax liabilities of one of the owners (see App. A, *infra*, 16a n.12). *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States* v. *Kocher*, 468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). See also *United States* v. *Eaves*, 499 F.2d 869, 870-871 (10th Cir. 1974).

If the decision below is permitted to stand, the government will be barred from foreclosing its valid tax liens against property subject to state homestead laws in those states in the Fifth (and now the Eleventh)[9] and Tenth Circuits where the nontaxpayer's

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[9] The decisions of the former Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981).

interest in the homestead is characterized by state law as an estate in land, rather than as an exemption from creditors. Our examination of state law indicates that those states are Texas, Alabama, Mississippi, Georgia, Louisiana,[10] Kansas, Oklahoma, and Wyoming. Conversely, the government will be able to enforce its lien in these circumstances in Florida, New Mexico, Utah, and in all of the states in both the Eighth and Ninth Circuits, which have refused to subject the government's statutory tax collection prerogatives to the nuances of state homestead law. Large amounts are potentially at stake. The Internal Revenue Service advises that as a result of the decision below, revenue collection will be reduced by $800,000 each year in Texas alone.

As we shall show, the differences in results within the states of the Fifth (and now the Eleventh) and Tenth Circuits rest upon distinctions in state law that are entirely unrelated to the Internal Revenue Service's statutory tax collection authority under the federal tax statutes. Similarly situated delinquent taxpayers should be subject to the same remedies of tax collection prescribed by Congress without regard to their state of residence. The disparity in treatment created by the decision below is unfair to taxpayers and the Internal Revenue Service alike. Res-

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[10] Although the court of appeals had previously held that the Louisiana homestead exemption laws were not effective against federal tax liens (*Carter* v. *United States*, 399 F.2d 340, 342 (5th Cir. 1968)), the decision below interpreted *Carter* to hold that the Louisiana homestead exemption did not affect the validity of the government's tax lien, but refused to permit foreclosure of that lien. (See App. A, *infra*, 14a-15a & n.11.) We have therefore classified Louisiana as a state in which the government will no longer be able to foreclose its lien.

olution of the conflicts among the courts of appeals on the questions presented is therefore necessary in order to establish a uniform national rule governing the Internal Revenue Service's ability to foreclose tax liens on a delinquent taxpayer's interest in homestead property.

Finally, by holding that a federal court cannot order the sale of property to enforce a tax lien that concededly attaches to the interest of one of its owners, the decision below severely impedes the government's tax collection authority in the Fifth and Eleventh Circuits in all cases where the delinquent taxpayer's assets are held jointly with other parties who have no outstanding tax liabilities. Since the government cannot enforce its tax liens against homestead realty in the affected states as long as the nontaxpayer owner maintains a homestead interest that is characterized by state law as an estate in land, the Internal Revenue Service will be required to bear the additional burden of monitoring delinquent accounts to ascertain whether such homestead interests have continued. Moreover, it will be necessary for the government to initiate litigation to reduce assessments to judgment and to refile its liens under 26 U.S.C. 6323(g) to keep them current, in order to avoid the expiration of the statute of limitations on collection and to protect its interest against competing creditors. The restrictions imposed by the decision below upon the collection of concededly valid tax liabilities represented by valid liens calls for review by this Court.

1. Congress has prescribed that if any person neglects or refuses to pay federal taxes, after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or

personal belonging to such person" (26 U.S.C. 6321). Generally, the Internal Revenue Code provides that the lien "shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed * * * is satisfied or becomes unenforceable by reason of lapse of time" (26 U.S.C. 6322).

A lien, however, is not self-executing but requires enforcement if the tax assessment which it secures is to be collected. Congress has therefore conferred broad powers upon the Secretary of the Treasury to take whatever administrative actions are necessary to insure the collection of taxes from persons whose accounts are delinquent. Thus, Section 7403 of the Code authorizes the Attorney General, at the request of the Secretary of the Treasury, to bring actions to enforce liens. Moreover, Section 6331(a) of the Code authorizes the Secretary to collect unpaid taxes by "levy upon all property and rights to property * * * belonging to such person or on which there is a lien * * *." Section 6331(b) defines "levy" to include "the power of distraint and seizure by any means." There are nine enumerated exemptions set forth in Section 6334(a) for property exempt from levy.[11] The list of exemptions is extremely narrow and is intended to be exclusive. Accordingly, Section 6334(c) provides that "[n]otwithstanding any other

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[11] The nine exemptions are: (1) wearing apparel and school books; (2) fuel, provisions, furniture and personal effects not exceeding $500 in value; (3) books and tools of a trade; (4) unemployment benefits; (5) undelivered mail; (6) certain annuity and pension payments; (7) workmen's compensation; (8) judgments for support of minor children; and (9) minimum exception for wages, salary, and other income.

law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334 of the Code has its roots in comparable statutory provisions dating back more than a century. See Rev. Stat. 3187, 3188 (1878 ed.); Sections 3691 and 3692 of the Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)). Although the list of enumerated exemptions from levy has been modernized in the 1954 codification, and the Tax Reform Acts of 1969 and 1976, Congress reaffirmed in 1954 the fundamental principle that "[p]rovisions of State law cannot grant an exemption from levy, and this subsection makes it clear that no other provision of Federal law shall exempt property from levy." S. Rep. No. 1622, 83d Cong., 2d Sess. 578 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A409 (1954).

This Court has accordingly interpreted the Internal Revenue Service's statutory authority to levy upon the property of a delinquent taxpayer in the light of Congress's intention that the enumerated list in Section 6334(a) shall constitute the sole source of exemptions from levy. As a unanimous Court observed in *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971), with respect to Section 6334(c), "[t]his language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law. *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Shambaugh* v. *Scofield*, 132 F.2d 345 (CA5 1942); *United States* v. *Heffron*, 158 F.2d 657 (CA9), cert. denied, 331 U.S. 831 (1947); Treas. Reg. § 301.6334-1(c). See *Birch* v. *Dodt*, 2 Ariz. App. 228, 407 P.2d 417 (1965)." Accord: *Fink* v. *O'Neil*, 106 U.S. 272, 276 (1882).

The Court's approving citations of the Ninth Circuit's *Heffron* decision (both in *Mitchell* and previously in *United States* v. *Bess*, 357 U.S. 51, 57 (1958)) and of the Treasury Regulation are significant. In *Heffron*, the court upheld our submission, rejected by the court below, that a state homestead law cannot insulate a delinquent federal taxpayer's interest in real property from forced sale, even where another owner occupying the homestead has no outstanding tax liabilities. The Treasury Regulation cited by the Court is similarly explicit on the question presented here. It states that "[n]o provision of a State law may exempt property or rights to property from levy from the collection of any Federal tax. *Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes*" (emphasis supplied). Accord: *United States* v. *Heasley, supra*; *Herndon* v. *United States, supra*; *Shaw* v. *United States*, 331 F.2d 493 (9th Cir. 1964).

2. Despite the foregoing authorities, the court below permitted the Texas homestead law to insulate respondents from the Internal Revenue Service's statutory authority to seize, sell, or foreclose its lien upon property to satisfy the unpaid liabilities of delinquent taxpayers. Its rationale rests upon a two-step analysis. First, the court held that the Texas homestead law created a present undivided interest in each owner of the real property, and was not merely an exemption from creditors. Second, the court held that respondents' interests in the properties could not be reached by the government's liens because they had no outstanding tax liabilities. Rather, the delinquent taxpayers were their deceased or former husbands and only the husbands' interests were subject to fore-

closure. However, since respondents had the right of occupancy and use in the properties, the court concluded that the district court could not order a sale of the property in order to enforce the government's tax lien that admittedly attached to the husbands' interests in the properties.[12]

We submit that, in relying upon the purported distinction between those homestead laws that create a present interest and those that merely provide an exemption from creditors,[13] the court below, and the Tenth Circuit in *Hershberger*, erroneously focused on respondents' interests in the properties rather than those of the delinquent taxpayers. It is, however, the interests of the delinquent taxpayers, and not respondents' interests, that are subject to collection under federal law for satisfaction of the unpaid tax liabilities. The only relevant question to be asked under state law is whether the *taxpayers* had interests in the property to which the liens attached. *Aquilino* v. *United States*, 363 U.S. 509 (1960). And it is undisputed that both taxpayers had interests in the real properties to which the government's liens attached. The fact that respondents likewise had in-

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[12] The protection afforded respondents from foreclosure by the decision below is not limited to the particular properties at issue. Rather, the court below suggested that respondents could exchange their homesteads for new homesteads without having to satisfy the government's lien (App. A, *infra*, 22a n.17).

[13] It was on this basis that the court below distinguished its prior decision in *Weitzner* v. *United States*, 309 F.2d 45 (5th Cir. 1962), cert. denied, 372 U.S. 913 (1963) (Florida homestead law that provides an exemption from creditors does not insulate property from federal tax collection despite occupancy of nontaxpayer spouse). See App. A, *infra*, 12a-14a & n.10.

terests in the properties did not serve to divest the delinquent taxpayers of their interests or put those interests beyond the reach of the tax collector.

Hence, the characterization of *respondents'* interests under state law is entirely irrelevant. Indeed, the fact that other parties share rights of possession, ownership and control over property with a delinquent taxpayer does not automatically prevent the United States from enforcing its tax lien against such property. For example, in the case of community property, such as the real property involved here, not only may the government's tax lien be enforced, but the entire property may be subjected to the payment of either spouse's federal tax liability. *Broday* v. *United States*, 455 F.2d 1097, 1100-1101 (5th Cir. 1972) (applying to Texas community property the rule in *United States* v. *Mitchell*, *supra*);[14] see also *Mulcahy* v. *United States*, 388 F.2d 300, 302 (5th Cir. 1968); *United States* v. *Overman*, 424 F.2d 1142 (9th Cir. 1970): *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1970).

Moreover, given the exclusive character of the enumerated list of exemptions set forth in Section 6334(a) of the Code (see page 12, *supra*), the particular characterization given a homestead exemption under state law (property right vs. exemption) can hardly be controlling, since Congress has not seen fit to provide an exemption for homesteads, however

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[14] The court below sought to distinguish *Broday* on the ground that it involved nonhomestead community property (see App. A, *infra*, 18a n.15). But there is no basis for the distinction. The principle applied by *Broday* is consistent with our submission that a federal tax lien can be enforced against property in which both the taxpayer and a nontaxpayer have interests under state law.

characterized, from forced sale and foreclosure under the internal revenue laws. Whatever policies may underlie state homestead laws and their characterization as interests in land or exemptions from private creditors' claims, they do not affect the federal tax remedies available to the government under the Internal Revenue Code. "Such state laws 'are not laws for the United States * * * unless they have been made such by Congress itself'." *United States* v. *Bess*, *supra*, 357 U.S. at 57, quoting *Fink* v. *O'Neil*, *supra*, 106 U.S. at 276. As the Eighth Circuit properly concluded in *Herndon* v. *United States*, *supra*, 501 F.2d at 1223, "[t]he federal levying statute could be considered the 'supreme law of the land' in relation to state exemption statutes. To hold otherwise would allow states to create statutorily or otherwise present property interests in homesteads so as to allow a homestead to be exempt from a federal tax levy."

3. In holding that the government could not foreclose its liens on the real properties at issue by seeking an order of sale of the property, the decision below erroneously rests on the further ground that respondents had no outstanding tax liabilities.[15] As the court saw the matter, a federal court in a foreclosure action brought by the United States under 26 U.S.C. 7403 cannot enforce a federal tax lien by ordering the sale of the property where there are

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[15] The court below thereby distinguished its prior decisions holding that the same Texas law did not insulate homestead property from federal tax collection procedures on the ground that both spouses had outstanding tax liabilities in those cases. See *Shambaugh* v. *Scofield*, 132 F.2d 345, 346 (1942); *United States* v. *Dallas National Bank*, 152 F.2d 582, 585 (1946), modified on another ground, 167 F.2d 468-469 (1948); *United States* v. *Estes*, 450 F.2d 62, 65 (1971). See App. A, *infra*, 12a; cf. App. B, *infra*, 30a.

joint owners of the property who are not delinquent taxpayers.

But this conclusion—first adopted by the court below in *Folsom* v. *United States*, 306 F.2d 361 (1962)—is expressly refuted by the language of Section 7403(a), which broadly authorizes the Attorney General to direct a civil action to be filed in a federal district court "to enforce the lien of the United States * * * with respect to such tax or liability or to subject *any property, o*[*f*] *whatever nature, of the delinquent*, or *in which he has any right, title, or interest*, to the payment of such tax or liability" (emphasis supplied). Moreover, Section 7403(b) requires that "[a]ll persons having liens upon or claiming any interest in the property" be made parties to the action. Finally, Section 7403(c) empowers the court to order "a sale of such property"—not the sale of an "interest" in the property—and direct "distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and the United States." Thus, the statute expressly authorizes the district court to subject the interests of persons other than the taxpayer (such as respondents) to an involuntary sale in the course of enforcing the government's lien on the taxpayer's interest in the property.

It is therefore plain that Congress has authorized the sale of property in which a delinquent taxpayer has any interest, not simply property in which he has the sole interest. The enforcement of federal tax liens cannot, as the decision below erroneously concluded, be confined to the sale of the delinquent taxpayer's interest in jointly held property. Indeed, as we have pointed out (*supra*, page 9), in square conflict with the court below, four other circuits have uniformly held that a federal district court can order

the sale of property to enforce a federal tax lien upon a delinquent taxpayer's partial interest in the property. *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States* v. *Kocher*, 468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973); see also *United States* v. *Eaves*, 499 F.2d 869, 870-871 (10th Cir. 1974). As the court below acknowledged (App. A, *infra*, 16a n.12), "[i]n those circuits the government therefore is entitled to sell the entire joint tenancy property rather than just the taxpayer's interest therein." Indeed, as the Second Circuit observed in *United States* v. *Kocher*, *supra*, 468 F.2d at 507, if the government were forced to acquire a delinquent taxpayer's interest in jointly held property, and then seek partition under state law, it might well require separate lawsuits, which would undoubtedly reduce the financial recovery of the government and also injure the taxpayer, insofar as the sale of his property interests would yield a lesser amount.

Surely Congress did not intend the tax collector to suffer delay by having to await the termination of occupancy of a homestead, or having to assume partnership or other partial interests in property together with a delinquent taxpayer's spouse or co-owners, in order to garner the uncertain yields of partition. Instead, to provide for prompt and efficient collection of the revenues, Congress authorized the forced sale of the entire property in which a delinquent taxpayer has an interest.[16]

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[16] *United States* v. *Boyd*, 246 F.2d 477 (5th Cir. 1957), and *United States* v. *Morrison*, 247 F.2d 285 (5th Cir. 1957), upon which the court below relied (App. A, *infra*, 16a-17a), do not

CONCLUSION

The petition for writs of certiorari should be granted. The Court may wish to consolidate the cases.

Respectfully submitted.

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FEBRUARY 1982

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support the broad proposition that the district court has equitable discretion to refuse to order a sale of property to foreclose a valid tax lien that attaches to the interest of one of the owners of the property. In *Boyd*, the court simply indicated that the district court has discretion not to order foreclosure if the lien did not exist or was junior to other liens, or if the property did not belong to the taxpayer. In those circumstances, "a decree of foreclosure would be neither appropriate nor effective" (246 F.2d at 481). Similarly, the reference to discretion in *Morrison* was addressed to the district court's ability in a quiet title action under 28 U.S.C. 2410 to "take whatever action is necessary to assure that the Government's lien is fully and effectually respected in accordance with its established rank" (247 F.2d at 291). Under that provision, a private party who brings an action that affects property on which the United States has or claims a lien may name the United States as a party.

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
UNIT A

Nos. 79-3358, 80-1020

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LUCILLE MITZY BOSCO ROGERS, Individually and as surviving spouse of PHILIP S. BOSCO, ET AL., DEFENDANTS-APPELLEES

July 6, 1981

Appeals from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case presents the interesting question whether the federal government may foreclose a federal tax lien on the Texas homestead of a delinquent taxpayer in order to satisfy the delinquent taxpayer's tax liability, when the taxpayer's spouse, also having an interest in the homestead, has no federal tax liability.

I. *Facts*

The facts in this case are not in dispute. In 1955, appellee Lucille Mitzy Bosco Rodgers [1] and her husband

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[1] Mrs. Rodgers' name was inadvertently misspelled in the caption of the case.

at that time, Philip S. Bosco, acquired as community property a residence in Dallas, Texas, which they occupied with their children as their homestead under Texas law.[2] In 1971 and 1972, the federal government made assessments against Philip S. Bosco for federal wagering taxes in the amount of $927,284.79, plus penalties and interest, for the taxable years 1966 through 1971. When Philip S. Bosco died in 1974, these taxes remained unpaid, as they do today. Mrs. Rodgers herself has no federal tax liability.

After her husband's death, Mrs. Rodgers continued to occupy the residence as her homestead. Her children of the marriage have since married and moved to their own homes. Mrs. Rodgers has remarried and now resides in the residence with her second husband. She plans to continue to maintain the residence as her homestead. At the time this suit was filed, she held no property that belonged to her deceased husband other than the homestead and certain personal property of less than $500.00 in value.

On September 23, 1977, the government instituted this suit in the United States District Court for the Northern District of Texas in order to: (1) reduce to judgment the tax assessment made against Mrs. Rodgers' deceased husband; (2) enforce the federal tax liens against all the property that belonged to the deceased taxpayer, including his interest in the Texas homestead of Mrs. Rodgers; and (3) obtain a deficiency judgment for any unsatisfied amount of the tax liability of the deceased taxpayer. Appellees, Mrs. Rodgers, her two adult children, and the executor of her deceased husband's estate, moved for sum-

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[2] *See* Tex. Const. art. XVI, §§ 50-52.

mary judgment on the ground that the federal tax liens may not defeat Mrs. Rodgers' interest in the homestead. They also asserted that they were entitled to recover, under 42 U.S.C. § 1988 (1976), attorney's fees in the amount of $3,000.00. The government filed a cross-motion for partial summary judgment on the questions whether the federal tax lien could be enforced against the homestead and whether appellees, defendants below, were entitled to recover attorney's fees.

On August 2, 1979, the district court denied the government's motion and granted summary judgment in favor of appellees. The court also awarded appellees attorney's fees in the amount of $3,000.00. The government filed notice of appeal from the district court's summary judgment for appellees together with the award of attorney's fees. The government then filed a second appeal of the district court's amended judgment after the district court granted the government's motion to alter or amend the district court's earlier judgment to one of only partial judgment in favor of appellees. This change in the judgment has no relevance to the substantive issues on appeal. These two appeals have been consolidated before us.[3] We now address the propriety of the summary judgment for and attorney's fees award to appellees separately.

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[3] In addition, this case was consolidated for oral argument with the separate case of *Ingram* v. *City of Dallas Department of Housing and Urban Rehabilitation*, slip op. p. 8754, —— F.2d —— (5th Cir. 1981), which involved the enforcement of a federal tax lien against a Texas homestead when one spouse was solely liable for one federal tax and both spouses were liable for a separate, second federal tax.

II. *Lien Foreclosure*

Under the Internal Revenue Code of 1954, if a taxpayer neglects or refuses to pay federal taxes upon assessment, notice, and demand by the government, a lien arises upon "all property and rights to property" belonging to the delinquent taxpayer. 26 U.S.C. §§ 6321, 6322 (1976). The Secretary of the Treasury or his delegate may bring an action to enforce a tax lien "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest . . ." to the payment of his taxes. *Id.* § 7403(a).

The questions of whether and to what extent a taxpayer has "property" or "rights to property" are determined under the applicable state law. *Slodov* v. *United States*, 436 U.S. 238, 256, n.19, 98 S.Ct. 1778, 1789 n.19, 56 L.Ed.2d 251 (1978); *Aquilino* v. *United States*, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 1279-80, 4 L.Ed.2d 1365 (1960); *Broday* v. *United States*, 455 F.2d 1097, 1099 (5th Cir. 1972). Once it has been determined under state law that the taxpayer owns property or rights to property, however, federal law controls for the purpose of determining whether a lien will attach to and be enforceable against such property or rights to property. *United States* v. *Mitchell*, 403 U.S. 190, 204-05, 91 S.Ct. 1763, 1771-72, 29 L.Ed.2d 406 (1971); *Broday* v. *United States*, 455 F.2d at 1099.

The realty involved in this case was, at the time of the attachment of the federal tax liens, the community property of Mrs. Rodgers and the now-deceased taxpayer under Texas law. *See* Tex. Fam. Code Ann. § 5.01 (Vernon 1975). Each spouse therefore owned an undivided one-half interest in the property. *Free* v. *Bland*, 369 U.S. 63, 82 S.Ct. 1089,

8 L.Ed.2d 180 (1962). In addition, the land was also the Boscos' homestead. Under Texas law, homestead property possesses different attributes and confers different interest to each spouse than does nonhomestead property.[4] Unlike nonhomestead property in Texas, a Texas homestead, whether the separate property of either spouse or community property, is exempt from forced sale, may not be alienated except on consent of both spouses, and, to the extent consistent with federal law, may not be encumbered by liens other than purchase money, property tax, and materialmen's liens. Tex. Const. art. XVI, § 50; Tex.Fam.Code Ann. § 5.81 (Vernon 1975). The homestead also may not, on the death of one of the spouses, be partitioned among the deceased spouse's heirs during the life-time of the surviving spouse, so long as the surviving spouse chooses to occupy it as a homestead, or so long as the guardian of the minor children may be permitted by law to occupy it. Tex. Const. art. XVI § 52. Each spouse possesses these interests in the homestead separately and distinctly from those of the other spouse.

Having determined that the deceased delinquent taxpayer had an undivided one-half interest in the homestead community property under Texas law, we turn now to federal law to determine whether the federal tax liens attached to and may be executed against his property interest, notwithstanding the lack of tax liability on the part of his spouse, Mrs. Bosco, now Mrs. Rodgers, and the absence of any tax liens on her undivided one-half interest in the property.

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[4] *See also* the related discussion, *infra*, addressing the question whether the Texas homestead provisions merely grant an exemption from creditors, or instead confer a property right.

The resolution of this case would have been greatly simplified had the property in this case been merely community property, without also being homestead property, since it is clear that nonhomestead community property may be reached by the government for the tax debts of either spouse. *See Broday* v. *United States*, 455 F.2d 1097 (5th Cir. 1972) (levy upon Texas community property checking account to satisfy antenuptial federal tax debt of one spouse). The presence of a tax liability limited to only one spouse would have been irrelevant.

This case, however, is complicated by the combined facts that the property involved is also homestead property and that only one spouse has federal tax liability. As one commentator points out:

> [T]here is a conflict in the cases as to whether a tax lien is valid upon a homestead interest. It has been held that the states cannot carve out homestead exemptions from the effect of the Federal tax liens. The resolution of this issue may depend upon whether there is involved a single interest of the taxpayer who is subject to tax liability, or whether both spouses have an interest while only one is under a tax liability.

9 J. Mertens, Law of Federal Income Taxation § 54.52 (1977) (footnotes omitted). Thus, contrary to the government's assertion, the presence of homestead property in this case renders inapplicable the rule of *Broday, supra*, which involved nonhomestead rather than homestead community property.[5]

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[5] We also distinguish, for the same reason, *United States* v. *Mitchell*, 403 U.S. 190, 91 S.Ct. 1763, 29 L.Ed.2d 406 (1971), *United States* v. *Dallas Nat. Bank*, 152 F.2d 582 (5th Cir. 1945), *modified on other grounds*, 164 F.2d 489 (5th Cir. 1947), and *Davis* v. *Birdsong*, 275 F.2d 113 (5th Cir. 1960). In *Mitchell*, the Supreme Court held that the government

In analyzing the issue before us, we note at the outset that the homestead interest of a *taxpayer* spouse, *i.e.*, that of one who himself has tax liability, clearly cannot by itself defeat a federal tax lien. Section 6334(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6334(a) (1976), specifies certain property that is to be exempt from a levy to satisfy federal tax liability.[6] Homestead property is not

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could collect delinquent taxes of a married Louisiana couple from the wife's one-half interest in their community property, even though the wife had, after the dissolution of the marriage, "renounced" her community "gains" under Louisiana law. In *Dallas Nat. Bank*, this Court allowed the enforcement of a federal tax lien against the delinquent taxpayer's income obtained from a testamentary trust of which she was a beneficiary and which contained, among other things, the testator's homestead. Finally, in *Davis*, this Court held that, in order to collect the "transferee liability" of a widow, as a transferee of assets from her deceased husband's estate, for the income tax liability of her deceased husband, the government could execute a tax lien on the nonhomestead realty that had been set aside under Georgia law to the taxpayer's widow as "year's support." Since these cases did not involve foreclosure of tax liens on homestead property, they do not control in the instant case.

[6] Section 6334(a) provides, in pertinent part:

Enumeration.—There shall be exempt from levy—

(1) Wearing apparel and school books. * * *;

(2) Fuel, provisions, furniture, and personal effects. * * *;

(3) Books and tools of a trade, business, or profession. * * *;

(4) Unemployment benefits. * * *.

(5) Undelivered mail. * * *.

(6) Certain annuity and pension payments. * * *.

(7) Workmen's compensation. * * *.

(8) Judgments for support of minor children. * * *.

(9) Minimum exemption for wages, salary, and other income. * * *.

26 U.S.C. § 6334(a) (1976).

listed in § 6334(a) as exempt property. The Code further provides, in § 6334(c):

> (c) No other property exempt.—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by [§ 6334(a)].

26 U.S.C. § 6334(c) (1976). Section 6334(c) thus would preclude the classification of homestead property as exempt property under § 6334(a). This conclusion is made clear by § 301.6334-1(c) of the Treasury Regulations promulgated by the Commissioner of Internal Revenue under the Code:

> (c) *Other property.* No other property or rights to property are exempt from levy except the property specifically exempted by section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

26 C.F.R. § 301.6334-1(c) (1980). Hence, the federal tax liens in this case clearly attached to the deceased taxpayer spouse's interest in the realty claimed as a homestead. They also undoubtedly could be executed against that interest if his was the only interest in the homestead, or if *both* spouses were delinquent taxpayers and the liens had attached to each spouse's interest in the homestead. *See United States* v. *Estes*, 450 F.2d 62 (5th Cir. 1971); *Shambaugh* v. *Scofield*, 132 F.2d 345 (5th Cir. 1942).

That the liens *attached* to the taxpayer spouse's homestead interest, however, does not necessarily mean that they may be *foreclosed* or otherwise enforced in a particular manner.[7] The authorities are divided over the question whether the government may execute a tax lien against a taxpayer spouse's interest in realty claimed as a homestead when the other spouse, having an equal interest in the homestead property, has no tax liability. The Ninth Circuit has held, in *United States* v. *Heffron*, 158 F.2d 657 (9th Cir. 1947), *cert. denied*, 331 U.S. 831, 67 S.Ct. 1510, 91 L.Ed. 1845 (1947), that a federal tax lien may be levied against a delinquent taxpayer spouse's one-half interest in the proceeds of the sale by the trustee in bankruptcy of the California homestead of the bankrupt taxpayer and his spouse in order to satisfy the taxpayer spouse's tax liability. Rejecting the nontaxpayer spouse's effort to obtain a $2,500.00 exemption provided under California law from the amount of the taxpayer spouse's one-half interest levied upon, the court stated that exemptions prescribed by state laws are "ineffective" againt federal tax liens. *Id.* at 659.

The Eighth Circuit is in accord with the Ninth Circuit's holding and reasoning in *Heffron*. In both *United States* v. *Heasley*, 283 F.2d 422 (8th Cir.

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[7] *Compare Tillery* v. *Parks*, 630 F.2d 775 (10th Cir. 1980), in which the Tenth Circuit permitted *attachment* of a federal tax lien on a taxpayer spouse's one-half interest in the homestead notwithstanding the effect on the alienability of the nontaxpayer spouse's one-half interest, *with United States* v. *Hershberger*, 475 F.2d 677 (10th Cir. 1973), in which the Tenth Circuit disallowed *foreclosure*, on the homestead to satisfy the federal tax liability of taxpayer spouse, due to the homestead interest of the nontaxpayer spouse.

1960) and *Herndon* v. *United States*, 501 F.2d 1219 (8th Cir. 1974), the Eighth Circuit held that the government may foreclose its tax lien on the taxpayer spouse's homestead interest in order to collect that spouse's unpaid taxes, notwithstanding the nontaxpayer spouse's interest in the homestead property. The court in *Heasley* followed the reasoning in *Heffron* that state homestead exemptions are of no effect against federal tax liens. 283 F.2d at 427. The *Herndon* court based its decision on its view that the Code provisions, discussed above, ancillary regulation, and supremacy clause of the United States Constitution dictate such a result. 501 F.2d at 1223.

Other authorities have reached the opposite result in determining whether the government may execute a federal tax lien against the homestead interest of a taxpayer spouse when the other spouse possesses an equal interest in the homestead and he or she has no tax liability. The Tenth Circuit has, in *United States* v. *Hershberger*, 475 F.2d 677 (10th Cir. 1973), adopted an analytical approach which focuses upon the nature of the interest created by the particular state's homestead laws. The Tenth Circuit has made a distinction between a homestead interest as an *exemption* under state law and a homestead interest as a *property right* under state law. Under this distinction, if a homestead is merely an exemption from general creditors under state law, then the nontaxpayer spouse's interest therein will not prevent execution of a federal tax lien upon the taxpayer spouse's interest in the homestead. *United States* v. *Hershberger*, 475 F.2d at 682. If, however, state law confers more than a mere exemption, and instead raises a homestead interest to the status of a present property right, then a federal tax lien may not be

foreclosed against the homestead property for as long as the nontaxpayer spouse's interest therein exists under state law. *Id.* In *Hershberger*, the court, finding that the Kansas homestead laws confer a present property right rather than a mere exemption, held that the government could not enforce its tax lien against the Kansas homestead interest of the delinquent taxpayer spouse so long as the nontaxpayer spouse maintained the property as her homestead, due to the nontaxpayer spouse's undivided one-half property interest in the homestead. *Id.*[8]

This distinction has also been applied by the Ninth Circuit. *See Shaw* v. *United States*, 331 F.2d 493, 497 (9th Cir. 1964) (finding a California homestead to be mere exemption and, accordingly, that nontaxpayer spouse could not remove federal tax lien from homestead as cloud upon her one-half interest). The Eighth Circuit, however, has rejected the validity of this distinction, and has also, as discussed *supra*, disagreed with the view that a nontaxpayer spouse's interest in a homestead might defeat a federal tax lien. *See Herndon* v. *United States*, 501 F.2d at 1222-23.

The government contends that the law in this Circuit is consistent with that of the Eighth Circuit and,

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[8] Earlier, the Tenth Circuit had stated, in dicta in *Jones* v. *Kemp*, 144 F.2d 478, 480 (10th Cir. 1944), that a nontaxpayer spouse has an indivisible, vested interest in a homestead which, if the person's marriage is valid so as to entitle him or her to claim a homestead interest, cannot be subject to levy and sale for the federal tax liability of the taxpayer spouse. The court in *Jones* permitted foreclosure, however, since the nontaxpayer spouse's marriage was invalid and she accordingly could not claim a homestead interest under Oklahoma law.

as reflected in *Heffron*, the Ninth Circuit.[9] The government asserts that this Court's decisions in *Shambaugh* v. *Scofield* and *United States* v. *Estes*, in which we permitted federal levy on Texas homesteads, should govern the instant case. We disagree. Both *Shambaugh* and *Estes* are distinguishable from the instant case. In each of those cases, both spouses possessed federal tax liability. Hence, the federal lien in each case attached to the homestead interests of both spouses. The granting of lien foreclosure in *Shambaugh* and *Estes* simply reflected the supremacy of a federal tax lien over the homestead interest of a delinquent taxpayer. In contrast, the case at hand involves the tax liability of only one spouse. The tax liens here, therefore, attached only to the taxpayer spouse's interest in the homestead property; the interest of the nontaxpayer spouse, Mrs. Bosco, now Mrs. Rodgers, is free of any tax liens. Despite this freedom, however, Mrs. Rodgers' interest in the homestead property obviously would be seriously affected by any foreclosure on the interest of the deceased taxpayer spouse. *Shambaugh* and *Estes* therefore do not apply in the situation before us. *See Morgan* v. *Moynahan*, 86 F.Supp. 522, 525 (S.D. Tex. 1949).

This Court has previously dealt on one other occasion with the attempt by the government to enforce a federal tax lien against the homestead interest of a delinquent taxpayer spouse despite the equal inter-

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[9] The law in the Ninth Circuit is somewhat unclear, since the Ninth Circuit has used both the "homestead exemptions are of no effect" approach of the Eighth Circuit, *see United States* v. *Heffron*, 158 F.2d at 659, and the exemption-property right distinction of the Tenth Circuit. *See Shaw* v. *United States*, 331 F.2d at 497.

est in the homestead of the other spouse and the absence of tax liability of the latter. On that occasion, this Court utilized the distinction between an exemption and a property right subsequently employed by the Tenth Circuit in *Hershberger* and the Ninth Circuit in *Shaw*. In *Weitzner* v. *United States*, 309 F.2d 45, 47-48 (5th Cir. 1962), *cert. denied*, 372 U.S. 913, 83 S.Ct. 727, 9 L.Ed.2d 720 (1963), this Court was faced with facts identical in all relevant respects to those in the instant case, except that a Florida homestead rather than a Texas homestead was involved. In *Weitzner*, we first quoted with approval the statement of one commentator that, although " '[i]t is well settled that state exemption laws do not protect property against federal tax liens,' " *id.* at 47-48 (quoting 9 J. Mertens, Law of Federal Income Taxation § 54.52, at 102), the resolution of the issue whether a federal tax lien is valid upon a homestead interest " 'may depend upon whether there is involved a single tax interest of the taxpayer who is subject to tax liability, or whether both spouses have an interest while only one spouse is under tax liability.' " *Id.* (quoting 9 J. Mertens, Law of Federal Income Taxation § 54.52, at 102). We then stated that "[i]f it is determined that a wife does not have, during the lifetime of her husband, a *property right* in a homestead . . . , we need proceed no further and the Government should prevail." *Id.* at 48 (emphasis added). Finding that a Florida homestead interest was an exemption rather than a property right under Florida law, *id.*, we allowed the government to foreclose its tax lien against the taxpayer spouse's interest in the homestead property despite the nontaxpayer spouse's homestead interest. Although we did not expressly indicate what the probable outcome would have been

had the Florida homestead laws conferred a property right rather than merely creating an exemption, our reasoning implied that foreclosure of the lien would not have been permitted in such event.[10]

This position that foreclosure of a federal tax lien on a homestead will be denied when the nontaxpayer spouse has a present property right in the homestead property under state law is consistent with the reasoning and holdings of analogous cases of this Circuit. In *Carter* v. *United States ex rel. D. I. R.*, 399 F.2d 340 (5th Cir. 1968), this Court disallowed federal levy in an action by a nontaxpayer spouse to enjoin the government from foreclosing its tax lien on the interest of her delinquent taxpayer spouse in their Louisiana homestead, owned equally by the taxpayer and herself. In doing so, we reasoned as follows:

> [A]s an undivided one-half interest in the property was owned by the [nontaxpayer spouse], separate and apart from her husband, the [government] cannot now attempt to seize and sell this interest on the theory that it comprises part of the husband's estate. The [government] is precluded from asserting title to property allegedly in the estate of the debtor husband when that property never formed part of his estate. The undivided one-half interest of the [nontax-

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[10] This implication was correctly seen by the Tenth Circuit in *United States* v. *Hershberger*, 475 F.2d at 682. Relying in part upon *Weitzner*, the *Hershberger* court properly refused federal levy in the same factual setting when the homestead laws of the state involved in that case did create a property right in the nontaxpayer spouse opposing the levy of the tax lien.

> payer spouse] is, therefore, immune from seizure and sale by the [government].

Id. at 343.[11]

Further, this Court held, in *Folsom* v. *United States*, 306 F.2d 361 (5th Cir. 1962), that because of the property interests of other cotenants, the government may not foreclose its federal tax lien on the one-sixth cotenancy interest of a delinquent taxpayer in nonhomestead realty. In language which applies with equal validity to the situation in the instant case, we said:

> The Government has a right to pursue the property of the taxpayer with all the force and fury at its command and by proper procedure obtain the last vestige of title and every right which such taxpayer owns. The law does not authorize the Government, however, in its pursuit, to force

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[11] The government notes that we also stated in *Carter* that "the Louisiana homestead exemption laws are not effective against federal tax liens. . . ." 399 F.2d at 342. The government reasons from this statement that the Texas homestead laws in the instant case are ineffective in every respect against the federal tax liens involved here. The government, however, has failed to read this language in the context of the entire sentence. Following this language, we then said, in the same sentence: "and, thus, the filing of the homestead exemption by [the nontaxpayer spouse] and her husband did not affect or destroy the *validity* of the government's tax lien." *Id.* (footnote omitted) (emphasis added). When the sentence is read as a whole, one can see that the Louisiana homestead exemption laws were not "effective" to the extent or in the sense that they did not "affect or destroy the validity" of the government's liens. This statement is merely a reiteration of the rule, discussed *supra*, that a federal tax lien prevails when posed against the taxpayer spouse's homestead interest standing alone.

> a public sale of the property of other joint owners. . . . The Government is not a joint owner or tenant in common and does not have the property rights incident to such a relationship.

Id. at 367. Underlying our reasoning was the view of this Circuit that, when a delinquent taxpayer shares his ownership interest in property jointly with other persons rather than being the sole owner, his "property" and "rights to property" to which the federal tax lien attaches under 26 U.S.C. § 6321, and on which federal levy may be had under 26 U.S.C. § 7403(a), involves only his *interest* in the property, and not the entire property. *Id.*[12]

Finally, we point out that courts are not compelled to foreclose a federal tax lien when the government brings a foreclosure action. Instead, Congress intended for courts to exercise their equitable powers in deciding whether to allow such foreclosure. *United*

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[12] Other circuits, taking the opposite view, have held that the government may reach the entire "property" in which the taxpayer has an "interest" rather than being limited merely to his "interest" in the property. In those circuits the government therefore is entitled to sell the entire joint tenancy property rather than just the taxpayer's interest therein. *See United States* v. *Trilling*, 328 F.2d 699, 702-03 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), *cert. denied*, 402 U.S. 978, 91 S.Ct. 1641, 29 L.Ed.2d 145 (1971); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States* v. *Kocher*, 468 F.2d 503, 506-07 (2d Cir. 1972), *cert. denied*, 411 U.S. 931, 93 S.Ct. 1897, 36 L.Ed.2d 390 (1973); *see also United States* v. *Eaves*, 499 F.2d 869, 870-71 (10th Cir. 1974), approving *Trilling*, but concluding that the question whether the entire joint tenancy property or only the taxpayer's interest therein is to be sold should be resolved by the district court exercising its discretion.

States v. *Boyd*, 246 F.2d 477, 481 (5th Cir. 1957), *cert. denied*, 355 U.S. 889, 78 S.Ct. 261, 2 L.Ed.2d 188 (1957); *United States* v. *Morrison*, 247 F.2d 285, 289-90 (5th Cir. 1957).

Accordingly, in this Circuit, when the federal government seeks to enforce a tax lien against the homestead interest of a delinquent taxpayer, and his or her spouse has no tax liability, the outcome of the case will turn on whether the homestead laws of the particular state merely create an exemption from general creditors or whether they instead confer a present property right in the person possessing the homestead interest.[13] If a homestead interest is merely an exemption under state law, federal levy may be had upon the taxpayer spouse's homestead interest despite the equal interest of the nontaxpayer spouse. If, on the other hand, a homestead interest is, under state law, a property right, possessed by the nontaxpayer spouse at the time the lien attaches to the taxpayer spouse's interest,[14] then the federal tax lien

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[13] The court in *Herndon* v. *United States*, 501 F.2d at 1221-22, inaccurately characterized the law in the Fifth Circuit on this point. That court incorrectly portrayed this Circuit as being in agreement with the position, adopted by the *Herndon* court, that a federal tax lien may be foreclosed in the situation involved in this case regardless of the nature of the interest created by the state's homestead laws. *Id.*

[14] The homestead interest must be a present property right at the time the lien attaches to the taxpayer spouse's homestead interest rather than a future property interest or one acquired after lien attachment. Thus, for example, the future interests of the taxpayer spouse's heirs or devisees which become present possessory interests upon the nontaxpayer spouse's death, and the homestead interest in the property of any subsequent spouse of the nontaxpayer spouse, may not defeat the federal tax lien once the nontaxpayer spouse's homestead interest has ceased to exist under state law.

may not be foreclosed against the homestead property for as long as the nontaxpayer spouse maintains his or her homestead interest under state law.[15] To make this determination in the case at hand, we must analyze Texas law on the nature of a homestead interest in that state.

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[15] In *Broday* v. *United States*, this Court declined to use the distinction between an exemption and a property right under state law in the context of enforcing a federal tax lien against the nonhomestead community property interest of the nontaxpayer spouse of a delinquent taxpayer. Quoting *United States* v. *Overman*, 424 F.2d at 1145 (federal tax lien enforced against community property—the nature of which is not indicated—of Washington couple for tax liability of one spouse), the *Broday* case stated that "all that section 6321 requires is that the interest be 'property' or 'rights to property.' It is of no statutory moment how extensive may be those rights under state law, or what restrictions exist in the enjoyment of those rights." 455 F.2d at 1101 (citation omitted). The court concluded that "the right of the United States to enforce its liens does not depend upon state laws which regulate the rights of creditors generally and does not depend upon whether the 'exemption' label is attached to the particular statute in question." *Id.*

Although this language in *Broday* would suggest that the exemption-property right distinction should not be employed in the instant case as well, *Broday* involved nonhomestead community property, in contrast to *Weitzner*, which did involve homestead community property and which relied on the exemption-property right distinction to resolve the suit. Further, the language in *Broday* has since been cited in only one federal case, *Short* v. *United States*, 395 F.Supp. 1151, 1154 (E.D. Tex. 1975), a case similar to *Broday* in that it too involved nonhomestead community property. Moreover, the rule in *Weitzner* is consistent with our holdings in *Carter* and *Folsom*. Additionally, the language in *Broday* viewed narrowly, is actually dicta, since this Court specifically found that the state statute involved in that case was an exemption statute. 455 F.2d at 1101. We therefore follow the exemption-property right distinction used by this Court in *Weitzner*.

Although there are some cases to the contrary,[16] the overwhelming weight of the authority in Texas

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[16] In *Foster* v. *Johnson*, 89 Tex. 640, 645, 36 S.W. 67, 69 (1896), the Texas Supreme Court stated:

> The homestead right [of the surviving spouse] under the constitution was not an estate in land, but simply a right to use and occupy it for a specified purpose, upon the contingency that it would cease whenever it was not occupied and used for that purpose.

Several decades later, the Texas Supreme Court, relying on *Foster* and the similar case of *Lee* v. *McFarland*, 19 Tex. Civ. App. 292, 46 S.W. 281 (1898, writ ref'd) (citing *Foster*), again stated:

> [U]nder the law, [testator's widow] could use the home place so long as she saw fit to occupy same as a homestead. This is not an estate. When the home place ceased to be used as a homestead, the interest owned therein by her deceased husband would go to the devisees described in the will.

Dakan v. *Dakan*, 125 Tex. 305, 83 S.W.2d 620, 625 (1935) (citations omitted). The statement in *Dakan* that a homestead is not an "estate" was later cited by the court in *White* v. *Glenn*, 138 S.W.2d 914, 919 (Tex. Civ. App.—Amarillo 1940, writ dism'd judgmt cor.).

Viewed in isolation, these cases tend to suggest that a Texas homestead interest is not a property right under Texas law. Closer analysis of Texas law, however, reveals that, for several reasons, the above four cases do not reflect Texas law on the nature of a Texas homestead interest. First, the statement in *Foster*, on which the other three cases ultimately relied for the proposition that a homestead is not an "estate," was itself made on a somewhat weak foundation, in light of language of the Texas Supreme Court in a case, *Stallings* v. *Hullum*, 89 Tex. 431, 35 S.W. 2 (1896), decided the same year as *Foster*. In *Stallings*, the Texas Supreme Court held that an attempted conveyance by a husband alone of a homestead did not convey the wife's interest nor did it even transfer the husband's one-half interest as soon as the land ceased to be the couple's homestead. Significantly, the Texas Supreme Court stated:

law holds that a Texas homestead interest is a property right in the nature of an estate in land. In *Woods* v. *Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929), the leading Texas case, the Texas Supreme Court initially set out the distinction between a homestead interest as an exemption and one as a property right:

> Generally it may be said that there are two concepts of the effect of constitutional and statutory provisions relating to the homestead. One is that these laws confer a mere privilege of exemption, which operates to prevent the use of the process of the court to sell certain property for the payment of debts. The other is that the homestead right is considered an estate in land vested in the person designated by law.

> It is not simply the alienation of the homestead right—that is to say the right of occupancy—that is prohibited [by Tex. Const. art. XVI, § 50]; it is the alienation of the *property itself*, the land or the lots, as the case may be * * * *The mere privilege of possession and enjoyment is not the measure of her right in the homestead.*

35 S.W. at 3 (emphasis added). The italicized portion of this quotation places into serious question the weight to be accorded the statement in *Foster*, quoted *supra*, that the Texas homestead right is merely one of use and occupancy.

Second, aside from reliance on one another, none of the above four cases has been cited by either the Texas Supreme Court or lower Texas state courts for the proposition, advanced by each of the four cases, that a Texas homestead is not an "estate."

Finally, the above four cases are contrary to the majority of Texas cases on the subject of the nature of a Texas homestead interest, including the Texas Supreme Court's most recent pronouncement, in *O'Neil* v. *Mack Trucks, Inc.*, 542 S.W.2d at 114, that "[i]t is well established that the homestead right, when fixed, is an estate in land. . . ."

19 S.W.2d at 35. After engaging in an extensive and thorough analysis of the historical development of the Texas homestead laws, the Texas Supreme Court concluded:

> [W]hen the constitutional provisions and statutes relating to the homestead are analyzed, we think the conclusion is inescapable that *their purpose and effect is to create estates as distinguished from mere privileges of exemption or possession.*

19 S.W.2d at 37 (emphasis added).

The Texas Supreme Court reiterated this view of a Texas homestead interest as being a property right in the nature of an estate in land, in *Paddock* v. *Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949):

> In Texas, we have held that the homestead is to be regarded as an *estate* created not only for the protection of the family as a whole, but for the units of the family. The wife has a *vested estate in the land* of which she cannot be divested during her life except by abandonment or a voluntary conveyance in the manner prescribed by law.

218 S.W.2d at 436 (emphasis added). The great majority of other Texas cases are in accord with this position. *See, e.g., O'Neil* v. *Mack Trucks, Inc.*, 542 S.W.2d 112, 114 (Tex. 1976), *recalled on other grounds*, 551 S.W.2d 32 (Tex. 1977) ("homestead right, when fixed, is an estate in land exempt from execution"); *Rancho Oil Co.* v. *Powell*, 142 Tex. 63, 175 S.W.2d 960, 965 (1943); *Cocke* v. *Conquest*, 120 Tex. 43, 35 S.W.2d 673, 678 (1931) (estate in land); *Sargeant* v. *Sargeant*, 118 Tex. 343, 15 S.W.2d 589, 593 (1929); *Hargadene* v. *Whitfield*, 71 Tex. 482,

9 S.W. 475 (1888); *W. T. Rawleigh Co.* v. *Blackwell*, 48 S.W.2d 754 (Tex. Civ. App.—Amarillo 1932, writ dism'd); *Sparks* v. *Robertson*, 203 S.W. 622, 623 (Tex.Civ.App.—Austin 1947, writ ref'd); *Crews* v. *General Crude Oil Co.*, 287 S.W.2d 243 (Tex.Civ. App.—Beaumont 1955, no writ); *Norman* v. *First Bank & Trust, Bryan*, 557 S.W.2d 797 (Tex.Civ. App.—Houston [1st Dist.] 1977, writ ref'd n. r. e.).

In *Evans* v. *Mills*, 67 F.2d 840 (5th Cir. 1933), this Court defined the nature of a Texas homestead interest under Texas law in the same terms that the Texas cases have employed:

> A homestead interest in Texas is not, as in some states, a mere exemption. It is a title in the land, of which, according to the settled public policy of the state, the owner may not be deprived except by abandonment or by the conveyance executed as required by statute.

Id. at 841 (citations omitted).

In light of the above authority, we must conclude that a Texas homestead interest is more than an exemption from the claims of general creditors under Texas law. It is an undivided, vested property right in land. Under our rationale in *Weitzner* and the analogous cases of *Carter* and *Folsom*, it follows that the government in the instant case may not foreclose its federal tax liens on the homestead interest of the deceased taxpayer—and thus on the homestead property at all—for as long as Mrs. Rodgers, the nontaxpayer spouse, complies with the requirements of Texas law for maintaining one's homestead.[17] Mrs.

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[17] Included in these laws would be, for example, those relating to the exchange of one's homestead for a new homestead. *See, e.g., Ellis* v. *Light*, 73 S.W. 551 (Tex. Civ. App. 1903, writ ref'd).

Rodgers' undivided one-half interest in the homestead property vested when the property was purchased during her marriage with the deceased taxpayer and continued under Texas law [18] after his death.[19] This interest was, and continues to be, a property right separate and apart from that of her deceased husband, and may not at present effectively be destroyed, as would be the result, by federal levy on the one-half interest held by the deceased taxpayer during his lifetime. The district court therefore correctly granted summary judgment to appellees on the issue of foreclosure of the federal tax liens on the homestead property involved here.

II. *Attorney's Fees*

The government's second contention is that the district court abused its discretion in awarding attorney's fees to appellees under 42 U.S.C. § 1988 (1976). We agree.

The Civil Rights Attorney's Fees Awards Act of 1976 provides, in pertinent part:

> [I]n any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976). In order for a taxpayer to be eligible to recover attorney's fees under § 1988

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[18] Tex. Const. art. XVI, § 52.

[19] Under Texas law, it is clear that Mrs. Rodgers' remarriage did not affect the homestead status of her interest in the property. *See Rancho Oil Co.* v. *Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943).

in his tax dispute with the government, he must be the defendant in the lawsuit. *Prince* v. *United States*, 610 F.2d 350, 352 (5th Cir. 1980); *Key Buick Co.* v. *C. I. R.*, 613 F.2d 1306, 1308-09 (5th Cir. 1980). To recover attorney's fees, the defendant taxpayer must demonstrate that the government's action was frivolous, unreasonable, or without foundation, although he need not show subjective bad faith. *Jones* v. *United States*, 613 F.2d 1311, 1313 (5th Cir. 1980).

In the case before us, appellees, defendants below, failed to show even the slightest justification for the attorney's fee award that they requested and received. There is no evidence whatsover that the government's action was frivolous, unreasonable, or without foundation. To the contrary, the substantive legal issue in this case was complex and difficult to resolve. The government had ample justification for bringing this suit, even though our decision is not in its favor. We therefore are compelled to conclude that the district court acted outside of its discretion in awarding attorney's fees to appellees. We reverse the district court on this point.

To summarize, we affirm the district court's granting of summary judgment to appellees on the issue whether the government may execute its federal tax liens on the Texas homestead involved here, but reverse the district court's award of attorney's fees to appellees.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit A

No. 79-3888

JOERENE INGRAM and LAUREL A. BATES, TRUSTEE,
PLAINTIFFS-APPELLANTS

v.

CITY OF DALLAS DEPARTMENT OF HOUSING &
URBAN REHABILITATION, ET AL., DEFENDANTS

UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE),
DEFENDANT-APPELLEE

July 6, 1981

Appeal from the United States District Court
for the Northern District of Texas

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This case involves an appeal from the summary judgment granted the federal government in the government's undertaking to foreclose its federal tax liens on the Texas homestead of one of appellants, Joerene Ingram, and her former spouse, Donald Ingram, for the sole tax liability of Donald Ingram relating to one federal tax and the joint tax liability

of Donald and Joerene Ingram relating to another federal tax.

During their marriage, Donald and Joerene Ingram acquired, as community property, a residence located in Dallas, Texas. They claimed this property as their homestead under Texas law. *See* Tex. Const. Art. XVI, §§ 50-52.

In 1972 and 1973, assessments were made under § 6672 of the Internal Revenue Code of 1954, 26 U.S.C. § 6672 (1976), against Donald Ingram, President of Dallas Auto Damage Appraisers, Inc. (DADA), as the person responsible for the collection and payment of social security and withholding taxes from the wages of the employees of DADA. The assessments related to unpaid taxes withheld from wages of employees of DADA from the first quarter of 1971 through the second quarter of 1972. After payments on account of these liabilities were made, there remains unpaid $9,330.51, plus interest.

In 1973, an assessment was made in the amount of $283.33, plus interest, against both Donald Ingram and Joerene Ingram relating to their unpaid income tax for the taxable year 1971. This amount remains unpaid at present.

On March 19, 1975, around which time the Ingrams were seeking a divorce, the Ingram's residence was destroyed by fire. The home was insured and the proceeds of the policy, approximately $50,000, were deposited into the registry of a Texas Domestic Relations Court. On September 3, 1975, the Ingrams obtained a divorce. Joerene Ingram was awarded custody of the two children of the marriage. In connection with the divorce, the Ingrams entered into a property settlement agreement in which they agreed to the disposition of their community property, in-

cluding the real property claimed as their homestead. After the payment of sums previously approved by the state Domestic Relations Court, the Ingrams agreed to divide the balance of the proceeds equally. They further agreed that Donald Ingram would convey his interest in the real property to Joerene Ingram in exchange for $1,500.00, to be paid from the proceeds of the sale of the property. With respect to their taxes, the Ingrams agreed that they would file separate income tax returns for the taxable year 1974, that Donald Ingram would pay any income tax on joint income for 1974, and that he would "hold Wife harmless for any deficiencies or assessments for the years 1971 through 1973."

The real property was conveyed to Laurel Bates, as trustee for Joerene Ingram. Joerene Ingram tried to sell the property, but was unable to find a purchaser for it. Joerene Ingram then received notice from the City of Dallas Department of Housing and Urban Rehabilitation that unless she complied with local ordinances the remains of the fire-damaged residence would be demolished. Following a hearing, notice requiring demolition was given. Joerene Ingram and Laurel Bates, appellants here, then instituted this suit in Texas state court to quiet title to the property, to remove the liens, and to enjoin demolition of improvements located on the property. The defendants were the United States, the City of Dallas Department of Housing and Urban Rehabilitation, and several creditors claiming an interest in the property.[1]

After the suit was removed to the United States District Court for the Northern District of Texas,

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[1] White Rock National Bank, Northpark National Bank, and E. M. Kahn & Company.

the government counterclaimed against appellants and Donald Ingram, added as a defendant on the counterclaim, for, *inter alia*, foreclosure of the tax liens for the sole liability of Donald Ingram for unpaid withholding taxes and for the joint liability of Donald and Joerene Ingram for unpaid income taxes. The government also cross-claimed against the other creditors. Appellants then sought summary judgment against the government and the other creditors on the ground that, as Joerene Ingram's homestead the property was insulated from creditors' claims.

Pursuant to a stipulation of the parties that appellants' legal position would not be prejudiced thereby, the property was sold and the proceeds, approximately $16,250.00, were placed in an escrow account pending the outcome of this suit. The stipulation also disposed of all claims except those of the government and E. M. Kahn & Company, a defendant creditor.[2] The government opposed appellants' motion for summary judgment on the ground that, in view of the division of the first insurance proceeds by the Ingrams and their intent, as allegedly reflected in the divorce decree, to sell the property,[3]

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[2] Defendant E. M. Kahn & Company claimed an interest in the property by virtue of its judgment lien in the amount of $389.42, plus costs, obtained on August 13, 1974. Defendant White Rock Bank disclaimed any interest in the property, and defendant Northpark National Bank failed to answer the complaint. The City of Dallas Department of Housing and Urban Rehabilitation consented to the sale of the property and agreed that the purchaser would bear responsibility for complying with local ordinances.

[3] The Ingrams' property agreement incident to their divorce provided in part that Joerene Ingram was to receive all title and interest in the real property that had been the Ingrams' residence, "subject to the payment to [Donald Ingram] of the sum of $1,500.00 from the proceeds of the sale [of the property] *when sold.*" (Emphasis added).

there were material questions of fact concerning whether the property remained Joerene Ingram's homestead. In addition, the government sought summary judgment on its counterclaims against Joerene and Donald Ingram on the ground that even if the property were a homestead, the state homestead exemption laws were ineffective against the federal tax liens.[4] The district court denied appellants' motion for summary judgment and granted, without explanation, the government's cross-motion for summary judgment on its counterclaims.[5] Appellants seek review of this judgment.

Today this Court has decided *United States* v. *Rogers*, slip opinion page 8740, —— F.2d —— (5th Cir. 1981), a case similar to the one at hand in that it too involved an attempt by the government to foreclose its federal tax liens on Texas homestead property to collect unpaid taxes. In *Rogers*, we discussed at length the law in this and other circuits regarding the enforceability of federal tax liens on state homestead property. Those legal principles are equally valid with respect to the instant case. Accordingly, if both spouses have federal tax liability, and the federal tax assessment was made against both spouses, then the government may foreclose its tax lien against the homestead property owned equally by the spouses. *United States* v. *Estes*, 450 F.2d 62 (5th Cir. 1971); *Shambaugh* v. *Scofield*, 132 F.2d 345

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[4] The government also sought summary judgment on its cross-claims against the remaining creditors on the ground that the sole creditor asserting a claim against the property, E. M. Kahn & Co., acquired its judgment lien after notices of the tax liens had been filed.

[5] The court also granted summary judgment to the government on its cross-claims against the other creditors.

(5th Cir. 1942). If only one spouse is liable for the federal taxes for which the assessment was made and the lien arose, however, then the question whether the federal government may execute that lien on homestead property of the taxpayer and his or her nontaxpayer spouse depends upon the nature of the homestead interest under state law. If a homestead interest is merely an exemption from general creditors under state law, then federal levy may be had. If, however, state law confers a present property right to a person possessing a homestead interest, then the lien may not be foreclosed for as long as the nontaxpayer spouse maintains his or her homestead interest under state law. *United States* v. *Rogers*, slip opinion page 8743, —— F.2d at ——; *Weitzner* v. *United States*, 309 F.2d 45, 47-48 (5th Cir. 1962), *cert. denied*, 372 U.S. 913, 83 S.Ct. 727, 9 L.Ed.2d 720 (1963); *see also United States* v. *Hershberger*, 475 F.2d 677, 682 (10th Cir. 1973). Since a Texas homestead interest is a property right under Texas law, *see United States* v. *Rogers*, slip opinion page 8751, —— F.2d at ——, the government could not levy a tax lien on a nontaxpayer spouse's homestead for as long as she maintained her homestead interest under Texas law.

Applying these principles to the instant case, it is clear that the government may foreclose its tax lien on the proceeds from the sale of the homestead property to collect the $283.33, plus interest, for the unpaid income tax owed by both Joerene and Donald Ingram. Both Joerene Ingram and Donald Ingram are liable for this tax. Therefore, under *Estes* and *Shambaugh*, any homestead interest Joerene Ingram may have in those proceeds is subordinate to the government's lien relating to that tax. Since there

is no genuine issue of material fact on this point, the district court acted correctly in granting summary judgment in favor of the government for levy of the lien for the unpaid income tax. We affirm this portion of the district court's decision.

The district court erred, however, in granting summary judgment to the government to the extent that the summary judgment also permitted the government to execute its lien relating to the $9,330.51, plus interest, in unpaid withholding taxes assessed against Donald Ingram. Only Donald Ingram is liable for these taxes; Joerene Ingram has no liability with respect to them. Accordingly, under *Rogers* and *Weitzner*, the government could not reach the proceeds of the sale of the realty to collect this sum, assuming Joerene Ingram maintained her homestead interest in the property under Texas law.

There appears from the record, however, a genuine issue of whether Joerene Ingram in fact maintained her homestead interest so as to entitle her to assert it now. Under Texas law, homestead property is "abandoned," or loses its homestead character, if the use of the property is discontinued without the intention of returning to it again. *Long Bell Lumber Co.* v. *Miller*, 240 S.W.2d 405, 407 (Tex. Civ. App.—Amarillo 1951, no writ). The Ingrams' division of the fire insurance proceeds,[6] their speculative intent,

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[6] The mere fact that the Ingrams' residence was destroyed by fire and that the Ingrams received insurance proceeds for the loss did not in itself destroy the Ingrams' homestead interest. Under Texas law, proceeds of an insurance policy on a Texas homestead are exempt from levy by the same provisions of the Texas Constitution that exempt the homestead itself; the proceeds stand in the place of that which has been destroyed. *Lee* v. *Honea*, 349 S.W.2d 110, 111 (Tex. Civ. App.—Forth Worth 1961, writ ref'd n.r.e.); *Johnson* v. *Hall*, 163 S.W. 399, 402 (Tex. Civ. App..—Texarkana 1914, no

as reflected in their divorce agreement,[7] to sell the property, and Joerene Ingram's subsequent efforts to sell the property—which, we note, began *before* the stipulation of the parties that she could do so—raise the fact question whether Joerene Ingram had abandoned the homestead and lost her homestead interest. Since there is a genuine issue of a material fact concerning the existence of Joerene Ingram's asserted homestead interest, the district court erred in granting summary judgment to the government with respect to the enforcement of the tax lien relating to the $9,330.51 in unpaid withholding taxes, plus interest. We accordingly reverse this part of the district court's judgment and remand for a trial to determine whether Joerene Ingram continues to possess a homestead interest which she may assert against federal levy for her former husband's federal withholding tax liability.

For the foregoing reasons, the judgment of the court below is AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

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writ). The insurance policy proceeds are exempt from levy for a period of six months from the date when the insured had the right to demand payment from the insurance company. *Walter Connally & Co.* v. *Hopkins*, 195 S.W. 656, 661 (Tex. Civ. App.—Texarkana 1917), *aff'd*, 221 S.W. 1082 (Tex. Comm'n App. 1920, holding approved).

We cannot determine from the record the date on which the Ingrams had the right to demand payment for their fire loss from their insurance company. We thus cannot determine whether the six-month grace period under Texas law for using the insurance proceeds to rebuild the homestead residence or to reinvest in a new one expired prior to the district court's order on January 31, 1979, allowing appellants to sell the property without incurring any prejudice to their legal rights in the litigation.

[7] *See* note 3, *supra*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 79-3358 & 80-1020

D.C. Docket No. CA-3-77-1291-C

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

LUCILLE MITZY BOSCO ROGERS, Individually and as surviving spouse of Philip S. Bosco, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of Texas

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 6, 1981

Issued As Mandate: Oct. 8, 1981

A true copy
Test:

GILBERT F. GANUCHEAU
Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ Betty G. Martinez
Deputy
New Orleans, Louisiana

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3888

D.C. Docket No. CA-3-77-0798-C

JOERENE INGRAM and LAUREL A. BATES, Trustee,
PLAINTIFFS-APPELLANTS

versus

CITY OF DALLAS DEPARTMENT OF HOUSING &
URBAN REHABILITATION, ET AL., DEFENDANTS

UNITED STATES OF AMERICA,
(INTERNAL REVENUE SERVICE),
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be and the same is hereby remanded in part to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

July 6, 1981

Issued As Mandate: Oct. 8, 1981

A true copy
Test:

GILBERT F. GANUCHEAU
Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ Betty G. Martinez
Deputy
New Orleans, Louisiana

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

79-3358
No. 80-1020

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

versus

LUCILLE MITZY BOSCO ROGERS,
DEFENDANTS-APPELLEES

Filed Sep. 28, 1981

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 6, 1981, 5 Cir., 198—, —— F.2d ——)
(September 28, 1981)

ORDER:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administra-

tive Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-3888

JOERENE INGRAM and LAUREL A. BATES, TRUSTEE,
PLAINTIFFS-APPELLANTS

versus

CITY OF DALLAS DEPARTMENT OF HOUSING &
URBAN REHABILITATION ET AL., DEFENDANTS

UNITED STATES OF AMERICA,
(INTERNAL REVENUE SERVICE),
DEFENDANT-APPELLEE

Filed Sep. 28, 1981

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 6, 1981, 5 Cir., 198—, —— F.2d ——)
(September 28, 1981)

ORDER:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that

the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

APPENDIX G

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing apparel and school books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, provisions, furniture, and personal effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) *Books and tools of a trade, business, or profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value;

(4) [as added by Section 406, Social Security Amendments of 1958, Pub. L. No. 85-840, 72 Stat. 1013, and amended by Section 104(c)(1), Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125] *Unemployment benefits.*—Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) [as added by Section 812, Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 36] *Undelivered mail.*—Mail, addressed to any person, which has not been delivered to the addressee.

(6) [as added by Section 104(c)(2), Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat.] *Certain annuity and pension payments.*—Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal or Honor roll (38 U.S.C. 562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) [as added by Section 104 (c. 2), Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. ——] *Workmen's Compensation.*—Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the Commonwealth of Puerto Rico.

(8) [as added by Section 945(a), Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, and amended by Section 1209 (c), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520] *Judgments for support of minor children.*—If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages,

or other income as is necessary to comply with such judgment.

(9) [as added by Section 1209(a) Tax Reform Act of 1976, Pub. L. No. 91-172, 83 Stat. ——], *Minimum Exemption for wages, salary, and other income.*—Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

* * * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

* * * * *

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes

of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6334-1 *Property exempt from levy.*

* * * * *

(c) *Other property.*—No other property or rights to property are exempt from levy except the property specifically exempted by section 6334(a). No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

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Opposition

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NO. 81-1476

In The

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,

Petitioner

v.

LUCILLE MITZI BOSCO ROGERS, ET AL.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, LUCILLE MITZI BOSCO RODGERS,[1] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Fifth Circuit in this case. That opinion is reported at 649 F.2d 1117.

QUESTION PRESENTED

With all due respect, the Solicitor General misperceived the issue in this case, which is:

1. Whether the exercise by the District Court of equitable discretion authorized by Congress [26 U.S.C. §7403(c)] is

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[1] The respondent's name was inadvertently misspelled in the caption of the case.

reviewable, when the Government did not claim in the Court of Appeals that the District Court abused its discretion, and the record reflects facts supporting the exercise of discretion by the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. ***Review is inappropriate, because the District Court had statutory discretion, exercised its discretion on competent evidence, and the Government did not contend in the Court of Appeals that the District Court abused such discretion.***

The sole issue in this case is whether the Supreme Court should review the exercise of discretion by the District Court. Based on competent evidence, the District Court held, pursuant to Section 7403(c) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §7403(c) (App. A, *infra* 1a), that the Government could not enforce the federal tax lien of Respondent's delinquent and deceased taxpayer husband, who was solely responsible for the tax liability, by foreclosing on the homestead property interest of Respondent, the non-taxpayer wife who had no tax liability. At no time in this controversy has the Government asserted that the District Court abused its discretion in not ordering foreclosure of the homestead of Respondent.

For the Supreme Court to review this case would violate the Court's ancient rule that it does not review discretionary decisions of a lower court in the absence of a claim of abuse of discretion. *Cook v. Burnley*, 78 U.S. (11 Wall.) 659 (1867); *Post v. Jones*, 60 U.S. (19 How.) 150 (1956). It is also time-honored that the Supreme Court does not review issues that were not presented to the Court below.

Section 7403(c) of the Code does not compel the District Court to order foreclosure in this case. Congress simply pro-

vided that the District Court "may" decree a sale of the property sought to be foreclosed to satisfy a tax debt. *United States v. Boyd*, 246 F.2d 477, 481 (5th Cir.), *cert. denied*, 355 U.S. 899 (1957); *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957).

Absent a Government claim in the Court of Appeals that the District Court abused its equitable powers in refusing to order foreclosure, this case does not present reviewable issues.

2. ***The suggested conflict of decisions does not warrant a review by this Court, for each case properly depends upon its own facts and the property rights created by the laws of the various States.***

The supposed conflict in the decisions, of which much is made by the Government, is a natural and proper result of our federal system. This Court has repeatedly looked to state law in determining the extent of property and rights to property to which a Government tax lien attaches. *United States v. Bess*, 357 U.S. 51, 55 (1958); *United States v. Brosnan*, 363 U.S. 237, 240 (1960); *Aquilino v. United States*, 363 U.S. 509, 512-513 (1960). Conflicting decisions are therefore logical and appropriate since the law of each state governs the extent of the property and rights to property of the taxpayer used to satisfy a federal tax lien.

The Government dramatically urges that the conflict between circuits necessitates a review by this Court.[2] There is no need to look for a conflict in decisions between the various

[2] The Government *for the first time* in this case asserts that this case will result in $800,000 lost tax revenue from simply the State of Texas in only one year. (Pet. p. 10). The record is devoid of any support for the Government's remarkable claim. Also, this Court has consistently condemned this practice of first presenting factual assertions to this Court. *Russell v. Southard*, 53 U.S. (12 How.) 139, 158-159 (1851); *Hopt v. Utah*, 114 U.S. 488, 491-492 (1885); *Adickes v S. H. Kress & Co.*, 398 U.S. 144, 157-158 n.16 (1970).

circuits. This Court merely has to look to different States within the original Fifth Circuit Court of Appeals[3] to find the much-feared conflicting decisions. As the Fifth Circuit pointed out below, its earlier decision of *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963), presents the identical facts with those of the instant case, except that a Florida homestead, rather than a Texas homestead was involved. The Fifth Circuit, however, examined Florida law and found that a Florida homestead interest was an exemption from creditors, rather than a property right. The Court allowed the Government to foreclose its tax lien against the taxpayer spouse's interest in the homestead property despite the nontaxpayer spouse's homestead interest. But when the Fifth Circuit was faced with a Texas homestead in the instant case, or a Louisiana homestead in *Carter v. United States ex rel. D.I.R.*, 399 F.2d 340 (5th Cir. 1968), the Court of Appeals reached a different conclusion.

These different cases turn on the diversity of state law, which this Court has observed present a situation that is based upon logic and sound legal principles. *Aquilino v. United States*, 363 U.S. 509, 514 (1960). Inasmuch as the Government has unsuccessfully sought before to persuade this Court that efficient tax administration requires overturning this Court's gemstone rule that state laws must be applied to ascertain taxpayers' property rights, its argument should again be rejected. *Compare United States v. Durham Lumber Co.*, 363 U.S. 522 (1960) *with Aquilino v. United States*, 363 U.S. 509 (1960). Congress, by granting discretion to the District Court, likewise recognized that varying States laws and facts would result in differing decisions.

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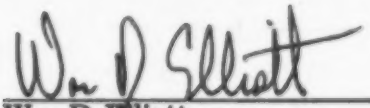
[3] Ignoring the Eleventh Circuit only for the purpose of this discussion.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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Appendix

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) FILING. — In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For the purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) PARTIES. — All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) ADJUDICATION AND DECREE. — The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.

Petitioner's Brief

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In the Supreme Court of the United States

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JOERENE INGRAM, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the existence of a state homestead law in a community property state exempts real property from forced sale under the Internal Revenue Code to satisfy the delinquent federal tax liability of one spouse, where the other spouse occupying the homestead is not a delinquent taxpayer and where state law characterizes a homestead interest as an estate in land.

2. Whether, in a foreclosure action brought by the United States under Section 7403(c) of the Internal Revenue Code, a federal court is empowered to order the sale of homestead real property to enforce a federal tax lien that attaches to a delinquent taxpayer's interest in the property, where the delinquent taxpayer's spouse occupying the homestead does not have outstanding tax liabilities.

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L. Simpkins, *Texas Family Law With Forms* (5th ed. 1977) 39

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1476

UNITED STATES OF AMERICA, PETITIONER

v.

LUCILLE MITZI BOSCO RODGERS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JOERENE INGRAM, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not issue an opinion in either case. The opinion of the court of appeals in *Rodgers* (Pet. App. 1a-24a) is reported at 649 F.2d 1117. The court's opinion in *Ingram* (Pet. App. 25a-32a) is reported at 649 F.2d 1128.

JURISDICTION

The judgments of the court of appeals in both cases were entered on July 6, 1981 (Pet. App. 33a-36a). On September 28, 1981, the court of appeals denied the government's petitions for rehearing with suggestions for rehearing en banc (Pet. App. 37a-40a). By orders dated

December 18 and January 18, 1982, Justice White extended the time within which a petition for writs of certiorari could be filed in these cases to February 5, 1982. The petition was filed on February 5, 1982, and granted on March 29, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Sections 6334 and 7403 of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 301.6334-1(c) of the Treasury Regulations on Procedure and Administration (26 C.F.R.) are set forth in the appendix to the petition at 41a-45a.

STATEMENT

1. *Rodgers*. On October 24, 1937, Philip S. Bosco and respondent Lucille Mitzi Bosco Rodgers[1] were married (R. 39).[2] In 1955, they obtained as community property the residential real property involved in this suit, which they occupied with their children as their homestead (Pet. App. 1a-2a). In 1971 and 1972, the Internal Revenue Service issued assessments totalling $927,284.79 for federal wagering taxes, penalties and interest, against Philip for the taxable years 1966 through 1971 (*id.* at 2a). These taxes remained unpaid at the time of Philip's death on November 6, 1974 (*ibid.*; R. 39). After Philip's death, respondent continued to occupy the property as her

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[1] Respondent's middle name and surname were inadvertently misspelled in the caption of the case in the courts below. We employ the correct spelling—Lucille Mitzi Bosco Rodgers.

[2] "R." references are to the original record on appeal in the court of appeals in each case. By order dated April 19, 1982, the Court granted the motions of the parties to dispense with printing of joint appendices.

homestead. The couple's children have married and left their parents' home. Respondent thereafter remarried and now occupies the homestead property with her present husband. At the time this suit was filed, respondent held no property belonging to Philip other than the homestead property and certain personal property having value less than $500 (*ibid.*).

The government instituted this suit in the United States District Court for the Northern District of Texas against respondent and Philip's son, daughter and executor, for the purposes of reducing to judgment the assessments against Philip, enforcing the tax liens against any property belonging to him, and obtaining a deficiency judgment in the amount of any unsatisfied part of the liability (Pet. App. 2a). In response, the defendants moved for summary judgment on the ground that they held no property belonging to Philip other than certain personal property of limited value and the real property which respondent claimed as a homestead (*id.* at 2a-3a).[3] The government filed a cross-motion for partial summary judgment asserting, *inter alia*, that the defendants' homestead claim did not insulate the property from enforcement of the federal tax liens and forced sale (*id.* at 3a). The district court granted partial summary judgment in favor of respondents (*ibid.*).[4]

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[3] Respondents also sought attorney's fees and the district court awarded them such fees of $3,000 (Pet. App. 3a, 23a-24a). The court of appeals, however, reversed this aspect of the district court's judgment, concluding "that the district court acted outside of its discretion in awarding attorney's fees to [respondents]" (*id.* at 24a). Respondents have not sought review in this Court of the attorney's fee question.

[4] The district court did not dispose of the government's claim for judgment based on the assessments against Philip, but directed the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b) (R. 102).

The court of appeals affirmed (Pet. App. 1a-24a). In so ruling, the court agreed that non-homestead community property may be reached in its entirety by the government in order to satisfy the tax debts of either spouse, and that homestead property may be reached by the government when both spouses are delinquent taxpayers (*id.* at 6a-8a). It further acknowledged that under Section 6334(a) and (c) of the Internal Revenue Code, which enumerate particular items of property that are exempt from levy, "the homestead interest of a *taxpayer* spouse, *i.e.*, that of one who himself has tax liability, clearly cannot by itself defeat a federal tax lien" (Pet. App. 7a; emphasis in original). The court therefore concluded that "federal tax liens in this case clearly attached to the deceased taxpayer spouse's interest in the realty claimed as a homestead" (*id.* at 8a). As a result, the court acknowledged that the tax liens "could be executed against that interest if his was the only interest in the homestead, or if *both* spouses were delinquent taxpayers and the liens had attached to each spouse's interest in the homestead" (*ibid.*, emphasis in original).

The court, however, resisted the conclusion that the tax liens may be foreclosed or enforced against the taxpayer spouse's interest in realty claimed as a homestead when the other spouse having an equal interest in the homestead property, has no outstanding tax liability. It noted that the authorities were divided on the question whether the government may foreclose its tax lien on a taxpayer spouse's interest in property, if a nontaxpayer spouse had a homestead interest in the property (Pet. App. 9a-10a).

As the court below observed, the Ninth[5] and Eighth[6] Circuits had held that the government could foreclose its tax lien in these circumstances. But the court followed the opposite conclusion reached in *United States* v. *Hershberger*, 475 F.2d 677 (10th Cir. 1973). There, the Tenth Circuit reasoned that if a homestead is merely an exemption from general creditors under state law, the nontaxpayer spouse's interest will not prevent execution of a federal tax lien on the taxpayer spouse's interest. If, on the other hand, state law characterizes a homestead interest as an estate in land, as the court found it did in *Hershberger*, the Tenth Circuit held that a federal tax lien may not be foreclosed against the homestead as long as the nontaxpayer spouse's interest exists under state law (Pet. App. 9a-11a). Since the court below determined that a Texas homestead interest confers an undivided, vested estate in land, it ruled that the government could not foreclose its federal tax liens on the interest of Philip as long as respondent, the nontaxpayer spouse, maintained a homestead interest in the property (*id.* at 19a-23a).

In support of its holding, the court below also relied on its prior decision holding that in a foreclosure action brought by the government under Section 7403 of the Code, the federal courts cannot require the sale of property to foreclose a valid federal tax lien that attaches to the interest of only one of the owners of the property (Pet. App. 14a-17a). The court, however, acknowledged that four other circuits have taken the opposite view, holding that the courts should, at the behest of the government, order the sale of jointly held property and distribute the

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[5] *United States* v. *Heffron*, 158 F.2d 657 (9th Cir.), cert. denied, 331 U.S. 831 (1947).

[6] *United States* v. *Heasley*, 283 F.2d 422 (8th Cir. 1960); *Herndon* v. *United States*, 501 F.2d 1219 (8th Cir. 1974).

proceeds attributable to a taxpayer's interest in it to the government in order to satisfy his tax liability (*id.* at 16a n.12).

2. *Ingram.* During their marriage, Donald Ingram and respondent Joerene Ingram acquired, as community property, a residence located in Dallas, Texas, and claimed this property as their homestead under Texas law. In 1972 and 1973, the Internal Revenue Service issued assessments against Donald Ingram under Section 6672 of the Code relating to unpaid taxes withheld from wages of employees of the Dallas Auto Damage Appraisers, Inc., of which Donald Ingram was president. The tax liabilities related to the period from the first quarter of 1971 through the second quarter of 1972. After payments on account of these liabilities were made, there remained unpaid $9,330.51, plus interest. In addition, in 1973, an assessment was made in the amount of $283.33, plus interest, against Donald and Joerene Ingram relating to their joint income tax liability for 1971. These amounts remain unpaid (Pet. App. 26a).

On March 19, 1975, at which time the Ingrams were seeking a divorce, their residence was destroyed by fire (Pet. App. 26a).[7] In connection with their divorce pro-

[7] The home was insured and the proceeds of the fire insurance policy, approximately $50,000, were deposited into the registry of the Domestic Relations Court where their divorce proceedings were pending. Joerene and Donald Ingram entered into a property settlement agreement, which provided, *inter alia*, that the parties would divide the proceeds equally and that Donald would convey his interest in the real property to Joerene in exchange for $1,500 to be paid from the proceeds of the sale of the property (Pet. App. 26a-27a).

In addition, Joerene and Donald agreed that they would file separate income tax returns for 1974, that Donald would pay any income tax on joint income for 1974, and that he would "hold [his] Wife harmless for any deficiencies or assessments for the years 1971 through 1973" (Pet. App. 27a).

ceedings, they entered into a property settlement agreement in which they agreed that Donald would convey his interest in the real property to respondent. After the property was conveyed to Laurel Bates, as trustee for respondent, attempts to sell the property failed. Respondent also received notice from the City of Dallas Department of Housing and Urban Rehabilitation that unless she complied with local ordinances, the remains of the residence would be demolished. Following a hearing, notice requiring demolition was given. Respondent and Laurel Bates thereupon instituted this action in state court to quiet title to the property, to remove the liens that encumbered it, and to enjoin demolition of the improvements located on the property (Pet. App. 27a).

The suit was removed to the United States District Court for the Northern District of Texas (Pet. App. 27a). Thereafter, the United States filed a counterclaim against respondent and Donald Ingram, who was added as a defendant, seeking foreclosure of its tax liens for the sole liability of Donald Ingram for unpaid withholding taxes and for the joint liability of Donald and Joerene Ingram for unpaid income taxes. Respondent sought summary judgment urging that the property was insulated from creditors' claims because it was her homestead. Pursuant to a stipulation of the parties, the property was sold and the proceeds (approximately $16,250) were deposited into the registry of the district court, pending the outcome of the suit.[8] The government opposed respondent's motion for summary judgment on the ground that there was a material question of fact concerning whether she had abandoned the homestead.

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[8] The parties agreed that their rights, claims, and priorities would be determined as if the sale had not taken place, and that the proceeds would be divided according to their respective interests (Pet. App. 28a; R. 75).

In addition, the government filed a cross-motion for summary judgment on its counterclaim on the ground that the state homestead exemption was ineffective against the federal tax liens.[9] The district court granted the government's motion for summary judgment (Pet. App. 28a-29a).

On the authority of its decision in *Rodgers*,[10] the court of appeals reversed. It held that if respondent maintained her homestead interest in the property, the government was not entitled to enforce its tax lien based on Donald Ingram's withholding tax liability. The court, however, affirmed the judgment insofar as the district court had permitted the government to satisfy its claim relating to the joint income tax liability from the proceeds of sale. An issue of fact remained as to whether respondent continued to maintain her interest in the property as a homestead. If that were the case, she could assert her homestead interest as a defense against foreclosure by the Internal Revenue Service for the purpose of satisfying her former husband's federal withholding tax liability. The court therefore remanded the case for that determination (Pet. App. 31a-32a).

SUMMARY OF ARGUMENT

I

Congress has prescribed that if any person neglects or refuses to pay federal taxes, after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to

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[9] The government also sought summary judgment on its cross claims against the competing creditors on the ground that the tax liens had priority over their interests (Pet. App. 28a-29a).

[10] The court of appeals consolidated the case for oral argument with *Rodgers* (Pet. App. 3a n.3).

property, whether real or personal, belonging to such person" (26 U.S.C. 6321). A lien, however, is not self-executing but requires enforcement if the tax assessment which it secures is to be collected. Congress has therefore conferred broad powers upon the Secretary of the Treasury to take whatever administrative actions are necessary to insure the collection of taxes from persons whose accounts are delinquent. Thus, Section 7403 of the Code authorizes the Attorney General, at the request of the Secretary of the Treasury, to bring actions to enforce liens.

Moreover, Section 6331(a) of the Code authorizes the Secretary to collect unpaid taxes by "levy upon all property and rights to property * * * belonging to such person or on which there is a lien * * *." Section 6331(b) defines "levy" to include "the power of distraint and seizure by any means." There are nine enumerated exemptions set forth in Section 6334(a) for property exempt from levy. The list of exemptions is extremely narrow and is intended to be exclusive. Accordingly, Section 6334(c) explicitly provides that "[n]otwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." Section 6334 of the Code has its roots in comparable statutory provisions dating back more than a century. See Rev. Stat. 3187, 3188 (1878 ed.); Sections 3691 and 3692 of the Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)). Although the list of enumerated exemptions from levy has been modernized in the 1954 codification and in the Tax Reform Acts of 1969 and 1976, Congress reaffirmed in 1954 the fundamental principle that "[p]rovisions of State law cannot grant an exemption from levy, and this subsection makes it clear that no other provision of Federal law shall exempt property from levy." S. Rep. No. 1622, 83d Cong.,

2d Sess. 578 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A409 (1954).

This Court has accordingly interpreted the Internal Revenue Service's statutory authority to levy upon the property of a delinquent taxpayer in the light of Congress's intention that the enumerated list in Section 6334(a) shall constitute the sole source of exemptions from levy. As a unanimous Court observed in *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971), with respect to Section 6334(c), "[t]his language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law. *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Shambaugh* v. *Scofield*, 132 F.2d 345 (C.A. 5 1942); *United States* v. *Heffron*, 158 F.2d 657 (C.A. 9), cert. denied, 331 U.S. 831 (1947); Treas. Reg. § 301.6334-1(c). See *Birch* v. *Dodt*, 2 Ariz. App. 228, 407 P.2d 417 (1965)." Accord: *Fink* v. *O'Neil*, 106 U.S. 272, 276 (1882).

The Court's approving citations of the Ninth Circuit's *Heffron* decision (both in *Mitchell* and previously in *United States* v. *Bess*, 357 U.S. 51, 57 (1958)) and of the Treasury Regulation are significant. In *Heffron*, the court upheld our submission, rejected by the court below, that a state homestead law cannot insulate a delinquent federal taxpayer's interest in real property from forced sale, even where another owner occupying the homestead has no outstanding tax liabilities. The Treasury Regulation cited by the Court is similarly explicit on the question presented here. It states that "[n]o provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. *Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes*" (26 C.F.R.

301.6334-1(c); emphasis supplied). Accord: *United States* v. *Heasley, supra; Herndon* v. *United States, supra.*

Despite the foregoing authorities, the court below permitted the Texas homestead law to insulate respondents from the Internal Revenue Service's statutory authority to seize, sell, or foreclose its lien upon property to satisfy the unpaid liabilities of delinquent taxpayers. Its rationale rests upon a two-step analysis. First, the court held that the Texas homestead law created a present undivided property interest in each spouse, of the real property, and was not merely an exemption from creditors. Second, the court held that respondents' interests in the properties could not be reached by the government's liens because they had no outstanding tax liabilities. Rather, the delinquent taxpayers were their deceased or former husbands and only the husbands' interests were subject to foreclosure. However, since respondents had a right of occupancy and use in the properties, the court concluded that the district court could not order a sale of the property in order to enforce the government's tax lien that admittedly attached to the husbands' interests in the properties.

In relying upon the purported distinction between those homestead laws that create a present interest and those that merely provide an exemption from creditors, the court below, and the Tenth Circuit in *United States* v. *Hershberger*, 475 F.2d 677 (1973), erroneously focused on respondents' interests in the properties rather than those of the delinquent taxpayers. It is, however, the interests of the delinquent taxpayers, and not respondents' interests, that are subject to collection under federal law for satisfaction of the unpaid tax liabilities. The only relevant question to be asked under state law is whether the *taxpayers* had interests in the property to which the liens attached. *Aquilino* v. *United States*, 363 U.S. 509

(1960). Here, it is undisputed that both taxpayers had community property interests in the real properties to which the government's liens attached. Accordingly, the tax lien attached to and became enforceable against their interests, no matter how extensive or limited their interests were. These interests were extensive and, as community property, was fully liable for the debts of either spouse. See *United States* v. *Mitchell*, 403 U.S. 190 (1971). The fact that respondents likewise had interests in the properties did not serve to divest the delinquent taxpayers of their interests or put the properties beyond the reach of the tax collector. "To hold otherwise would allow states to create statutorily or otherwise present property interests in homesteads so as to allow a homestead to be exempt from a federal tax levy." *Herndon* v. *United States*, *supra*, 501 F.2d at 1223.

II

In holding that the government could not foreclose its liens on the real properties at issue by seeking an order of sale of the property, the decision below erroneously rests on the further ground that respondents had no outstanding tax liabilities. As the court saw the matter, a federal court in a foreclosure action brought by the United States under 26 U.S.C. 7403 cannot enforce a federal tax lien by ordering the sale of the property where there are joint owners of the property who are not delinquent taxpayers. Thus, the court concluded that the government was prohibited from enforcing its lien even against the taxpayers' admitted interests in the properties.

But this conclusion—first adopted by the court below in *Folsom* v. *United States*, 306 F.2d 361 (1962)—is expressly refuted by the language of Section 7403(a), which broadly authorizes the Attorney General to direct a civil action to be filed in a federal district court "to enforce the

lien of the United States * * * with respect to such tax or liability or to subject *any property, o[f] whatever nature, of the delinquent*, or *in which he has any right, title, or interest*, to the payment of such tax or liability" (emphasis supplied). Moreover, Section 7403(b) requires that "[a]ll persons having liens upon or claiming any interest in the property" be made parties to the action. Finally, Section 7403(c) empowers the court to order "a sale of such property"—not the sale of an "interest" in the property—and direct "distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." Thus, the statute plainly authorizes the district court to subject the interests of persons other than the taxpayer (such as respondents) to an involuntary sale in the course of enforcing the government's lien on the taxpayer's interest in the property.

It is therefore clear that Congress has authorized the sale of property in which a delinquent taxpayer has any interest, not simply property in which he has the sole interest. The enforcement of federal tax liens cannot, as the decision below erroneously concluded, be confined to the sale of the delinquent taxpayer's interest in jointly held property. Indeed, four other circuits have uniformly held that a federal district court can order the sale of property to enforce a federal tax lien upon a delinquent taxpayer's partial interest in the property. *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States* v. *Kocher*, 468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973); see also *United States* v. *Eaves*, 499 F.2d 869, 870-871 (10th Cir. 1974). As the court below acknowledged (Pet. App. 16a n.12), "[i]n those circuits

the government therefore is entitled to sell the entire joint tenancy property rather than just the taxpayer's interest therein." If the government were forced to acquire a delinquent taxpayer's interest in jointly held property, and then seek partition under state law, it might well require separate lawsuits, which would undoubtedly reduce the financial recovery of the government and also injure the taxpayer, insofar as the sale of his property interests would yield a lesser amount. See *United States* v. *Kocher*, *supra*, 468 F.2d at 507.

Congress did not intend the tax collector to suffer delay by having to await the termination of occupancy of a homestead, or having to assume partnership or other partial interests in property together with a delinquent taxpayer's spouse or co-owners in order to garner the uncertain yields of partition. Instead, to provide for prompt and efficient collection of the revenues, Congress authorized the forced sale of the entire property in which a delinquent taxpayer has an interest.

ARGUMENT

I

A STATE HOMESTEAD LAW IN A COMMUNITY PROPERTY STATE DOES NOT EXEMPT REAL PROPERTY FROM FORCED SALE UNDER THE INTERNAL REVENUE CODE TO SATISFY THE DELINQUENT FEDERAL TAX LIABILITY OF ONE SPOUSE, WHERE THE OTHER SPOUSE OCCUPYING THE HOMESTEAD IS NOT A DELINQUENT TAXPAYER AND WHERE STATE LAW CHARACTERIZES A HOMESTEAD INTEREST AS AN ESTATE IN LAND

A. Congress Has Vested The Commissioner Of Internal Revenue With Broad Power To Collect Delinquent Tax Liabilities

1. These cases present two important questions relating to the power of the Commissioner of Internal Reve-

nue to enforce the collection of valid and delinquent tax liabilities, pursuant to uniform rules of nationwide application, without regard to the provisions of state law governing the rights of private creditors.

Congress has prescribed that if any person who is liable for federal taxes neglects or refuses to pay them after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person" (26 U.S.C. 6321). Generally, the lien "shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time" (26 U.S.C. 6322). Thus, the statutory tax lien is broadly cast to reach every interest in property owned by the delinquent taxpayer. Examination of the present provisions, and their similar statutory predecessors (Sections 3670 and 3671 of the Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)), establishes that "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945).

After the lien created by Congress attaches to a delinquent taxpayer's interests in property, in encumbers his rights to the property and, in general, subsequently arising interests do not affect the lien. [11] "[I]t is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere* * * *." *Burton* v. *Smith*, 38 U.S. (13 Pet.) 464, 483 (1839); *United*

[11] Congress has chosen to subordinate a federal tax lien to certain other enumerated interests that arise before notice of the tax lien is filed. A few specified interests (*e.g.*, mechanic's liens) are entitled to priority over a federal tax lien even where notice has been filed. See 26 U.S.C. 6323.

States v. *Bess*, 357 U.S. 51, 57 (1958). A federal tax lien, however, is not self-executing. Rather, it requires enforcement if the unpaid taxes it secures are to be collected. Accordingly, Congress has conferred broad powers upon the Secretary of the Treasury to take affirmative action to enforce collection of tax liens in aid of federal revenues. Section 7403(a) of the Code therefore authorizes the Attorney General, at the request of the Secretary of the Treasury, to institute a civil action in federal district court "to enforce the lien of the United States * * * or to subject any property, o[f] whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability." Furthermore, in Section 6331(a), Congress has authorized the Secretary "to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt under Section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." Section 6331(b) defines "levy" to include "the power of distraint and seizure by any means." Congress also has made explicit in this regard that "[i]n any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

Section 6334(c) explicitly provides that the only exemptions from federal collection procedures are those enumerated in Section 6334(a). In this respect, Section 6334(c) provides that "[n]otwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." The list of exemptions has always been extremely narrow and is intended to be exclusive. Indeed, there is no doubt that Congress regarded the exemptions enumerated in Section 6334(a) as the exclusive exemptions from federal tax collection pro-

cedures. In enacting the present provision in 1954, Congress reaffirmed the fundamental principle that "[p]rovisions of State law cannot grant an exemption from levy, and this subsection [6334(c)] makes it clear that no other provision of Federal law shall exempt property from levy." S. Rep. No. 1622, 83d Cong., 2d Sess. 578 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. A409 (1954). Moreover, Treasury Regulations on Procedure and Administration, Section 301.6334-1(c), specifies that property made exempt by state personal property or homestead exemptions is nevertheless subject to levy for collection of federal taxes. See also Treasury Regulations Part 69, Article 1204 (1926 Revenue Act).

The present version of Section 6334(a) exempts nine categories of property from collection procedures. [12] The statute, however, has its roots in comparable early revenue measures enacted by Congress. See, *e.g.*, Act of July 14, 1798, ch. 75, Sections 8, 9, 13, 1 Stat. 597, 600, 601, exempting from distress to satisfy taxes which were imposed on land, dwelling houses and slaves, "tools or implements of a trade or profession, beasts of the plough necessary for the cultivation of improved lands, arms, or the household utensils, or apparel necessary for a family" and providing for collection of the tax first from "goods, chattels or effects" and, if that source were insufficient, from the land, or dwelling house that was encumbered by the tax lien. One of the stated purposes for these provi-

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[12] Section 6334(a) now exempts: (1) certain wearing apparel and school books, (2) fuel, provisions, furniture and personal effects not exceeding $500 in value, (3) books and tools of trade not exceeding $250 in value, (4) unemployment benefits, (5) undelivered mail, (6) certain annuity and pension payments, (7) workmen's compensation, (8) amounts of income necessary for a delinquent taxpayer to comply with a judgment against him for child support, and (9) a minimum amount of salary, wages and other income.

sions was to provide for a "mode of assessment and collection to be uniform throughout the United States." 8 Annals of Cong. 1564 (1851).

Subsequent early statutes altered the items exempt from collection only in minor respects. In the Act of Jan. 9, 1815, ch. 21, Section 26, 3 Stat. 173, 174, Congress substituted household furniture for the previously exempt household utensils, otherwise leaving unchanged the list of exemptions. The exemptions recognized in 1815 continued in the Act of Mar. 2, 1861, ch. 68, Section 31, 12 Stat. 197, and the Act of Aug. 5, 1861, ch. 45, Section 35, 12 Stat. 303, 304. In 1864 (Act of June 30, 1864, ch. 173, Section 28, 13 Stat. 232, 233-234), however, Congress modified the list, exempting "tools or implements of a trade or profession, one cow, arms, and provisions, and household furniture kept for use, and apparel necessary for a family." In 1865, Congress added school books to the 1864 list of exemptions. Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 471; see 67 Cong. Globe (Pt. I) 700 (1865).

The list of exempt property was revised again in the Act of July 13, 1866, ch. 184, Section 9, 14 Stat. 101, 108), which provided in relevant part:

> That there shall be exempt from distraint and sale, if belonging to the head of a family, the school-books and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep for a period not exceeding thirty days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools, or implements of a trade or profession to an

amount not greater than one hundred dollars shall also be exempt * * *.

These exemptions continued virtually unchanged for more than 80 years. See Sections 3187 and 3188 of the Rev. Stat. (1878 ed.) and Sections 3691 and 3692 of the Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)).

In 1954, Congress modernized the exemptions from federal tax collection procedures. The new provision exempted necessary wearing apparel and school books, fuel, provisions, personal effects, furniture, arms, livestock and poultry to the extent of $500; and necessary books and tools for the taxpayer's trade or profession up to $250 in value. Continuing its longstanding policy that the list of available exemptions from levy should be extremely narrow, Congress thereafter amended Section 6334 on five occasions and added the remaining provisions that now appear in the Code.[13] See H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 304-305 (1975); S. Rep. No. 94-938, 94th Cong., 2d Sess. 388 (1976); H.R. Rep. No. 1884, 89th Cong., 2d Sess. 18 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. 19 (1966).

2. Here, the court of appeals held that a state homestead law in a community property state exempts real property from forced sale under the Internal Revenue Code to satisfy the delinquent federal tax liability of one

[13] The five additional exemptions are as follows: Exemption for unemployment benefits (Social Security Amendments of 1958, Pub. L. No. 85-840, Section 406, 72 Stat. 1047); exemption for undelivered mail (Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, Section 812, 79 Stat. 170); exemption for pension payments and workmen's compensation (Federal Tax Lien Act of 1966, Pub. L. No. 89-719, Section 104(c)(2), 80 Stat. 1137); exemption of amounts for the support of minor children (Tax Reform Act of 1969, Pub. L. No. 91-172, Section 945(a), 83 Stat. 729); exemption for a minimum amount of wages, salary and other income (Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1209(a), 90 Stat. 1709).

spouse, where the other spouse occupying the homestead is not a delinquent taxpayer and where state law characterizes a homestead interest as an estate in land. Hence, the court below permitted the Texas homestead law to circumscribe the Internal Revenue Service's statutory authority to seize, sell, or foreclose its lien upon property to satisfy the unpaid liabilities of delinquent taxpayers. Its rationale rests upon a two-step analysis. First, the court held that the Texas homestead law created a present undivided interest in each spouse, and was not merely an exemption from creditors. Second, the court held that respondents' interests in the properties could not be reached by the government's liens because they had no outstanding tax liabilities. Rather, the delinquent taxpayers were their deceased or former husbands and only the husbands' interests were subject to foreclosure. However, since respondents had a right of occupancy and use in the properties, the court concluded that the district court could not order a sale of the property in order to enforce the government's tax lien that admittedly attached to the husbands' interests in the properties.

But given the exclusive and narrow list of exemptions from forced sale set forth in the Internal Revenue Code (page 17 and note 12, *supra*), the particular characterization of a state homestead law can hardly be controlling. Congress has simply not seen fit to insulate homesteads from forced sale and foreclosure under the internal revenue laws, whether the statutes granting such homestead rights are cast as exemptions from creditors or estates in land. Indeed, as we shall show, the decisions of this Court have uniformly established the broader principle that encompasses this case: that state laws do not affect the collection remedies available to the Treasury under the Internal Revenue Code. "Such state laws 'are not laws for the United States * * * unless they have been made

such by Congress itself.' " *United States* v. *Bess*, *supra*, 357 U.S. at 57, quoting *Fink* v. *O'Neil*, 106 U.S. 272, 276 (1882).

Moreover, in relying upon the purported distinction between those homestead laws that create a present interest and those that merely provide an exemption from creditors, the decision below erroneously focused on respondents' interests in the properties rather than those of the delinquent taxpayers. It is, however, the interests of the delinquent taxpayers, and not respondents' interests, that are subject to collection under federal law for satisfaction of the unpaid tax liabilities. The only relevant question to be asked under state law is whether the *taxpayers* had interests in the property to which the liens attached. *Aquilino* v. *United States*, 363 U.S. 509 (1960). And it is undisputed that both delinquent taxpayers had community property interests in the real properties to which the government's liens attached. The fact that respondents likewise had interests in the properties did not serve to divest the delinquent taxpayers of their interests or put the properties beyond the reach of the tax collector.

B. State Homestead Laws Do Not Insulate A Taxpayer's Property From Collection And Forced Sale To Satisfy His Federal Tax Liability

1. a. As the Court recently observed in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979), "[t]hat collection of taxes is vital to the functioning, indeed existence, of government cannot be denied. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 425, 428, 431 (1819); *Springer* v. *United States*, 102 U.S. 586, 594 (1881). Congress recognized as much over 100 years ago when it authorized creation of federal tax liens. Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107, recodified as

amended in 26 U.S.C. §§ 6321-6323. The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens * * *."

Accordingly, an unbroken line of decisions of this Court has established that federal tax collection does not depend upon the law of the particular state in which the delinquent taxpayer or his property is located. In *Springer* v. *United States*, 102 U.S. 586 (1881), an ejectment action brought by the United States against a delinquent taxpayer whose property was distrained and sold to the government, the Court rejected the claim that the single sale of the entire property was invalid because the property was separately assessed as two lots under the state tax statute. As the Court concluded, "[t]he statute of Illinois had no application to the point whether the premises should be sold by the collector *en masse* or in two or more parcels" (*id.* at 594). Accord: *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 21-22 (1825); *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 53-54 (1825).

The correctness of the Court's conclusion in *Springer* follows from the fact that in the exercise of its constitutional power "To lay and collect Taxes" (Art. I, Sec. 8), Congress has chosen to establish uniform federal rules rather than to bind the federal tax collector to the nuances of state law. "The exertion of that power is not subject to state control. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932). See also *United States* v. *Snyder*, 149 U.S. 210, 214 (1893).

Accordingly, state law barriers against private creditors' collection efforts against certain property interests do not prevent the collection of concededly valid tax

claims. For example, in *United States* v. *Bess*, 357 U.S. 51 (1958), the government sought to recover from the beneficiary of life insurance policies the amount of federal income taxes owed by the insured at the time of his death, to the extent of the cash surrender value of the policies. Although tax liens had attached to all of the insured's property before his death, the beneficiary claimed that under state law the insured's property right represented by the cash surrender value was not subject to creditor's liens, whether such liens were asserted by a private creditor or by a state agency. This Court, however, rejected the claim that state law insulates a delinquent taxpayer's property from collection to satisfy his federal tax liability. The pertinent part of the opinion stated (357 U.S. at 56-57; footnote omitted):

> [O]nce it has been determined that state law creates sufficient interests in the insured to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States. Such state laws "are not laws for the United States * * * unless they have been made such by Congress itself." *Fink* v. *O'Neil*, 106 U.S. 272, 276; cf. *Commissioner* v. *Tower*, 327 U.S. 280. The provisions of the Internal Revenue Act creating liens upon taxpayer's property for unpaid income taxes, unlike § 6 of the Bankruptcy Act, 30 Stat, 548, as amended, 11 U.S.C. § 24, do not specifically provide for recognition of such state laws. The fact that in § 3691 Congress provided specific exemptions from distraint is evidence that Congress did not intend to recognize further exemptions which would prevent attachment of liens under § 3670. *Knox* v. *Great West Life Assurance Co.*, [212 F.2d 784 (6th Cir. 1954)]; *United States* v. *Heffron*, 158 F.2d 657 [(9th Cir. 1947)]; *Shambaugh* v. *Sco-*

field, 132 F.2d 345 [(5th Cir. 1942)]; *Smith* v. *Donnelly*, [65 F. Supp. 415 (E.D. La. 1946)].

Accord: *Kyle* v. *McGuirk*, 82 F.2d 212, 213 (3d Cir. 1936); *Kieferdorf* v. *Commissioner*, 142 F.2d 723, 725 (9th Cir.), cert. denied, 323 U.S. 733 (1944).

Subsequently, in *United States* v. *Mitchell*, 403 U.S. 190 (1971), a unanimous Court reaffirmed the inapplicability of state exemption laws to federal tax collection proceedings. There, the taxpayers were respectively a widow and divorcee domiciled in the community property state of Louisiana. Because their husbands had failed to file tax returns, the government moved to collect the outstanding tax delinquencies from life insurance proceeds and property inherited from one of the women's parents, on the ground that each taxpayer possessed an immediate vested ownership interest in half of the community property income and was personally responsible for the tax on her share. The taxpayers argued, *inter alia*, that their subsequent renunciation of the community under Louisiana law exonerated them from paying their share of the tax liabilities of the community. But this Court recognized no such defense, even though it "conceded that these cases are 'hard' cases and exceedingly unfortunate for the two women taxpayers" (*id.* at 205; footnote omitted). Their renunciations of the community did not relieve them of their obligation to pay federal taxes because "an exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy" (*id.* at 204). As a result, the divorced woman lost the benefit of an inheritance that arose after the dissolution of her marriage, and the widow lost her beneficiary interest in her husband's life insurance policy.

The Court further elaborated upon the primacy of federal law with respect to the collection of federal tax liabilities in the following terms (403 U.S. at 204-205):

> Section 6321 of the 1954 Code imposes a lien for the income tax "upon all property and rights to property * * * belonging to" the person liable for the tax. Section 6331(a) authorizes levy "upon all property and rights to property * * * belonging to such person * * *." What is exempt from levy is specified in § 6334(a). Section 6334(c) provides, "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." This language is specific and it is clear that there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law. *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958); *Shambaugh* v. *Scofield*, 132 F.2d 345 (C.A. 5 1942); *United States* v. *Heffron*, 158 F.2d 657 (C.A. 9), cert. denied, 331 U.S. 831 (1947); Treas. Reg. § 301.6334-1(c). See *Birch* v. *Dodt*, 2 Ariz. App. 228, 407 P.2d 417 (1965).

Both in *Mitchell* and previously in *United States* v. *Bess*, *supra*, 357 U.S. at 57, the Court's approving citations of *Shambaugh* v. *Scofield*, 132 F.2d 345 (5th Cir. 1942), and *United States* v. *Heffron*, 158 F.2d 657 (9th Cir.), cert. denied, 331 U.S. 831 (1947), and of the pertinent Treasury Regulation, are significant. In *Shambaugh* v. *Scofield*, *supra*, the court below previously upheld the Commissioner's right to sell homestead real estate to satisfy the unpaid federal tax liabilities of both spouses. There, as here, the taxpayers invoked the Texas homestead exemption law and urged that their homestead realty was immune from forced sale to satisfy an income tax lien. But the court dismissed the contention as "untenable" (132 F.2d at 346) because the federal tax statutes authorizing the seizure and sale of property were

"enacted to effectuate a constitutional power" as "the supreme law of the land" (*ibid.*) and these statutes did not exempt homesteads. As the court below subsequently observed in characterizing the effect of its decision in *Shambaugh*, "the Texas homestead exemption does not erect a barrier around a taxpayer's home sturdy enough to keep out the Commissioner of Internal Revenue." *United States* v. *Estes*, 450 F.2d 62, 65 (1971).

b. These considerations concerning the supremacy of the federal taxing statutes with respect to collection proceedings are equally applicable to these cases where respondents likewise invoke the Texas homestead law as a bar to the Commissioner's efforts at collection. To be sure, the court below sought to distinguish its prior decision in *Shambaugh* on the ground that the forced sale of the homestead in that case was to satisfy the joint federal tax liability of both spouses (see Pet. App. 7a-8a, 12a). But if, as we submit, the Texas homestead law does not exempt realty from seizure and sale by the Internal Revenue Service, it should not matter that only one of the spouses in each of the instant cases had outstanding tax liabilities. Under a proper analysis, once the homestead realty is treated as any other type of jointly held property that is fully subject to levy and sale, the attachment of the lien to the taxpayer-spouse's interests authorizes the government to enforce the lien upon the delinquent taxpayer's community property interests in the properties by selling the entire joint tenancy property and reducing the taxpayer's interests to money. *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States* v. *Kocher*,

468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973).[14]

In sum, if state homestead laws do not insulate a taxpayer's property from collection to satisfy his federal tax liability, homestead properties must yield to the federal tax collector whether one or both spouses are delinquent taxpayers. If the result were otherwise, the homestead interest of a non-taxpayer spouse would serve to protect the interest of a delinquent taxpayer spouse even though the homestead laws themselves do not protect the delinquent taxpayer. The peculiarity of such a result exposes the fallacy of the decision below. One cannot accept the primacy of federal law in federal tax collection proceedings and nevertheless permit state homestead exemptions to have any limiting effect upon the Commissioner's statutory authority to collect delinquent taxes. Since properties characterized as homesteads under state law are not exempt from federal tax collection as a matter of federal law, the policy underlying that broad rule of federal supremacy therefore cannot admit any exception for jointly held homesteads where only one of the spouses is a delinquent taxpayer.

Indeed, this was the conclusion reached by the Ninth Circuit in *United States* v. *Heffron*, *supra*, which, as we have noted (pages 23-25, *supra*), this Court cited with approval in *Mitchell* and *Bess*. In *Heffron*, the court upheld our submission, rejected by the decision below, that a state homestead law cannot insulate a delinquent federal taxpayer's interest in real property from forced sale, even where another owner occupying the homestead has no outstanding tax liabilities. In these circumstances,

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[14] In Point II (pages 40-45, *infra*), we discuss the authority of the federal courts to order the sale of such property in actions brought by the United States under 26 U.S.C. 7403(c).

the court ordered the entire proceeds of the bankruptcy sale of the delinquent taxpayer's interest distributed to the Internal Revenue Service, without regard to the state statutory homestead exemption. As the court below acknowledged (Pet. App. 9a-10a), this result was followed by the Eighth Circuit in *United States* v. *Heasley*, *supra*, and *Herndon* v. *United States*, *supra*, both of which reaffirmed that homestead exemptions prescribed by state law are of no effect as against federal tax liens. Accord: *United States* v. *Musselman*, 48 A.F.T.R.2d (P-H) ¶ 81-5331 (S.D. Iowa Oct. 16, 1981).[15]

c. The elaboration of the Eighth Circuit's rationale in favor of our position in these cases is set forth in *Herndon*. There, the court offered three reasons in support of the proposition that state homestead exemption laws do not preclude the United States from levying upon and selling the taxpayer's interest in homestead property even where a nontaxpayer spouse has an interest in the property (501 F.2d at 1223). First, Section 301.6334-1(c) of the Treasury Regulations, which this Court cited with approval in *Mitchell* (403 U.S. at 205), explicitly provides that state exemption statutes, including homestead laws, have no validity in relation to the federal tax levying statute. Section 301.6334-1(c) states as follows:

> No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws

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[15] Cf. *Shaw* v. *United States*, 331 F.2d 493 (9th Cir. 1964) (federal tax lien enforceable against homestead property where homestead law confers privileges and exemptions rather than creating present property interest).

> is, nevertheless, subject to levy by the United States for collection of its taxes.

This Regulation implements Congress' clearly stated intent at the time of the 1954 codification that state law exemptions cannot grant an exemption from federal tax levy (see pages 16-17, *supra*). Moreover, it furthers the congressional purpose to establish a mode of assessment and collection that is uniform throughout the nation (see page 17, *supra*).

Second, the court in *Herndon* observed that to the extent that the federal taxing statutes conflicted with state law exemptions, the federal provisions necessarily had to prevail. As the court stated (501 F.2d at 1223), in terms that decisively refute that basis of the decision below—

> *Scofield* properly recognizes that the federal levying statute should be considered the "supreme law of the land" in relation to state exemption statutes. To hold otherwise would allow states to create statutorily or otherwise present property interests in homesteads so as to allow a homestead to be exempt from a federal tax levy. The collection of federal taxes in this instance should be prior to any rights of the state to exempt its citizens from federal taxing power.

Third, the court in *Herndon* relied upon the fact that the federal tax law has provided for a narrow and exclusive set of exemptions from federal levy and has not provided for a homestead exemption. "Congress, but not this court, may, if it wishes, determine that citizens of all states should possess a homestead exemption free from federal tax levy" (*ibid.*).

Indeed, to the extent that Congress has addressed the broader question of the applicability of state law since the 1954 codification, it has adhered to the fundamental principle, to which the private tax bar likewise subscribes, that provisions of state law should not exempt property

from tax levy. Thus, in 1959, in the *Final Report of the Committee on Federal Liens* of the American Bar Association, *reprinted in* House Comm. on Ways and Means, 89th Cong., 2d Sess., *Legislative History of the Federal Tax Lien Act of 1966* at 118 (1966), which contained its suggestions relative to modernization of the tax lien laws, the ABA committee indicated to Congress that it had considered whether to recommend that the collection of federal taxes be made subject to the exemption laws of the states. The committee, however, rejected the basic notion as inappropriate, and Congress thereafter refrained from implementing it. In this regard, the ABA committee stated (*id.* at 175-176):

> It would mean that, depending entirely on each State's concept of the relative equities of debtors and creditors, the tax lien would be unenforceable in some States against life insurance policies, spendthrift trust income, and homesteads (ranging in value from $1,000 in New York to unlimited in Minnesota), while like property of taxpayers in other states would be subject to the tax lien. It seems preferable, therefore, for Congress to give consideration to whether additional exemptions are warranted, on a uniform national basis.

2. The opinion below acknowledged that "[o]nce it has been determined under state law that the taxpayer owns property or rights to property * * *, federal law controls for the purpose of determining whether a lien will attach to and be enforceable against such property or rights to property" (Pet. App. 4a). What is more, the court below acknowledged that the federal tax liens attached to the delinquent taxpayer spouses' community property interests in the realty claimed as a homestead because homestead property is not listed in Section 6334(a) of the Internal Revenue Code as exempt property (Pet. App. 7a-8a). In the court's view, however, the

attachment of the tax liens was not sufficient to vindicate the government's unquestionably valid claims. The court put the matter as follows: "That the liens *attached* to the taxpayer spouse's homestead interest, however, does not necessarily mean that they may be *foreclosed* or otherwise enforced in a particular manner" (Pet. App. 9a; emphasis in original; footnote omitted).[16]

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[16] It is not at all clear what, if any, significance the court of appeals assigned to its holding that a federal tax lien attaches to a taxpayer's interest in jointly owned property claimed as a Texas homestead. Although the court recognized that a tax lien attaches to the taxpayer's interest in the property, it ruled that the lien is not enforceable as long as the nontaxpayer maintains her homestead interest under Texas law (Pet. App. 9a). The court cited, as examples of maintaining a homestead interest, the exchanging of the original homestead for a new homestead or the holding of the proceeds of a fire insurance policy (received on the destruction of the homestead) for a period of six months during which the proceeds may be invested in a new homestead (Pet. App. 22a n.17, 31a-32a n.6). See *Ellis* v. *Light*, 73 S.W. 551 (Tex. Civ. App. 1903); *Lee* v. *Honea*, 329 S.W.2d 110, 111 (Tex. Civ. App. 1961); *Johnson* v. *Hall*, 163 S.W. 399, 402 (Tex. Civ. App. 1914); *Walter Connally & Co.* v. *Hopkins*, 195 S.W. 656, 661 (Tex. Civ. App. 1917) aff'd, 221 S.W. 1082 (Tex. Comm'n App. 1920).

The court's holding in this regard creates substantial difficulties for the taxpayer, his spouse, the new owner of the original homestead property, and the government as well. As we have indicated (pages 15-16, *supra*), the essence of a lien is that after it attaches to property it continues to encumber the property in the hands of those to whom it is subsequently passed. *United States* v. *Bess*, *supra*, 357 U.S. at 57. Accordingly, if Mrs. Rodgers were to exchange her homestead, it would be encumbered in the hands of the new owner. Under the literal terms of the court's holding, however, the lien would not be enforceable against the original homestead property held by the new owner, until Mrs. Rodgers' homestead interest in the new property she acquired (or any subsequent replacements) terminated under local law. This result would be unfortunate for Mrs. Rodgers, as well as for the person who acquires the old homestead property, and the government. If the new owner understands that the homestead

But surely allowing any creditor, much less the government, to attach its lien without permitting foreclosure or enforcement of the lien, accords but the hollowest of rights. It reduces the "right" of attachment to a mere abstraction insofar as there is no concrete remedy to vindicate that right. It hardly requires citation of authority that when the law creates rights, it creates corresponding legal remedies to enforce those rights. The right of a creditor to secure payment of a debt by enforcement

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property he is acquiring from Mrs. Rodgers is encumbered, he would be willing to exchange property with her only after reducing the value of her old homestead to reflect the fact that it is encumbered. Furthermore, not only will the government's collection of the unpaid taxes be delayed until Mrs. Rodgers' homestead interest in subsequently acquired property terminates, but, in the interim, the government will also bear the additional administrative burdens of monitoring the taxpayer's account, and keeping its notice of lien current and the underlying tax liability viable. See 26 U.S.C. 6323(g). The new owner of the old homestead property hardly occupies an enviable position, since the tax lien may become enforceable at any time Mrs. Rodgers terminates her homestead interest under local law (for example, by death or abandonment), an event he cannot reasonably predict.

The prospects are even bleaker from the government's perspective in the event a nontaxpayer spouse relies upon state law protection of the proceeds of an insurance policy to continue her homestead interest. In such circumstances, there is no assurance that the proceeds will not be dissipated during the protected six month period. In that event, the government's tax lien may well become worthless. Moreover, state law also protects the proceeds of sale of a homestead for a period of six months during which they may be invested in a new homestead. Tex. Rev. Civ. Stat. Ann. art. 3834 (Vernon 1966). The same infirmity also affects the exercise of that right. There is no assurance that the tax lien will remain valuable, since the proceeds could be dissipated. These problems are exacerbated in *Ingram*, since, as part of the divorce proceedings, the taxpayer has purported to convey his interest in the property to Mrs. Ingram without satisfying the tax lien.

of a lien against his debtor's property requires no less a corresponding remedy to enforce collection of the debt. For without an effective means of collection, a creditor's lien does little more than prevent the debtor from disposing of the property. It does not, however, prevent the debtor's enjoyment of the property at the expense of his creditor. Thus, possession of a lien without the ability to enforce it mocks the rights of the creditor and unjustly rewards the debtor who does not discharge his obligations as they become due.

3. In ruling that the government had a valid tax lien that attached to the property but no right to enforce its lien, the court of appeals sought to draw a distinction between homestead rights that create a present property right and those that create an exemption from general creditors. Under this distinction, if a homestead simply provides an exemption from general creditors under state law, the court believed that the existence of the nontaxpayer spouse's interest will not prevent execution of a federal tax lien upon the taxpayer spouse's interest in the homestead. If, on the other hand, state law confers more than a mere exemption and instead establishes a homestead interest as a present property right, [17] a federal tax lien may not be foreclosed against the homestead property as long as the nontaxpayer spouse has a property interest under state law. [18] See Pet. App. 10a-11a. Thus,

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[17] As the court below explained (Pet. App. 17a n.14), the tax lien is not enforceable when the nontaxpayer has a "present property interest," *i.e.*, a property right at the time the tax lien attached to the taxpayer spouse's interest in the homestead property.

[18] The protection afforded respondents from foreclosure by the decision below is not limited to the particular properties at issue. Rather, the court below suggested that respondents could exchange their homesteads for new homesteads without having to satisfy the government's lien (Pet. App. 22a n.17).

since respondents had the right of occupancy and use in the properties, the court below concluded that the government could not enforce the government's tax lien that admittedly attached to the husbands' interests in the properties. [19]

In so holding, the decision below followed *United States* v. *Hershberger*, 475 F.2d 677 (10th Cir. 1973). Accord: *Tillery* v. *Parks*, 630 F.2d 775 (10th Cir. 1980). There, the Tenth Circuit employed the selfsame distinction between exemption homesteads and property right homesteads. After finding that the Kansas homestead law confers a present property right rather than an exemption from creditors, the court held that the government could not enforce its tax lien against the Kansas homestead interest of the delinquent taxpayer spouse as long as the nontaxpayer spouse maintained the property

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[19] Although the court of appeals had previously held that the Louisiana homestead exemption laws were not effective against federal tax levies (*Carter* v. *United States*, 399 F.2d 340, 342 (1968)), the decision below interpreted *Carter* to hold that the Louisiana homestead exemption did not affect the validity of the government's tax lien, but refused to permit foreclosure of that lien. See Pet. App. 14a-15a & n.11. But a careful reading of *Carter* indicates that the court refused to enjoin the government from seizing real property jointly owned by a delinquent taxpayer-husband and his wife, on the ground that the Louisiana homestead exemption was not effective against a federal tax levy. The court further held, however, that the wife had an undivided one-half interest in the property that was immune from seizure and sale. If the government had sought foreclosure of its lien, the court would have presumably denied relief under its earlier ruling in *Folsom* v. *United States*, 306 F.2d 361 (1962), which held that a federal court in a foreclosure action brought by the United States under Section 7403 of the Code cannot enforce a federal tax lien by ordering the sale of property where there are joint owners of the property who are not delinquent taxpayers. As we shall show (at Point II, *infra*, page 41), this conclusion is expressly refuted by the plain language of Section 7403.

as her homestead, due to the nontaxpayer spouse's undivided one-half property interest in the homestead. [20]

We submit that, in relying on the purported distinction between those homestead laws that create a present interest and those that merely provide an exemption from creditors, [21] the court below, and the Tenth Circuit in *Hershberger*, erroneously focused on respondents' interests in the properties, rather than those of the delinquent taxpayers. The pertinent inquiry under Sections 6321, 6331 and 7403 of the Code is whether the *taxpayer* has property or rights to property to which the liens attached. As this Court stated in *Aquilino* v. *United States*, *supra*, 363 U.S. at 513-514, "once the tax lien has attached to the taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's 'property' or 'rights to property' " (footnote omitted).

As we have pointed out (pages 26-30, *supra*), the "province of federal law" that governs this case necessarily excludes the applicability of the Texas homestead law. If a delinquent taxpayer has property or rights to property,

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[20] Earlier, the Tenth Circuit had stated, in dicta in *Jones* v. *Kemp*, 144 F.2d 478, 480 (1944), that a nontaxpayer spouse has an indivisible, vested interest in a homestead. If the marriage is valid the nontaxpayer spouse can claim a homestead interest which cannot be subject to levy and sale for the federal tax liability of the taxpayer spouse. The court in *Jones* permitted foreclosure, however, because the marriage in question was invalid so that the nontaxpayer spouse could not claim a homestead interest under Oklahoma law.

[21] It was on this basis that the court below distinguished its prior decision in *Weitzner* v. *United States*, 309 F.2d 45 (5th Cir. 1962), cert. denied, 372 U.S. 913 (1963) (Florida homestead law that provides an exemption from creditors does not insulate property from federal tax collection despite occupancy of nontaxpayer spouse) (see Pet. App. 12a-14a & n.10).

a lien attaches to his property pursuant to Section 6321 and is enforceable by levy under Section 6331 (unless the property is exempted by federal law) or by foreclosure under Section 7403. The terms of the pertinent federal statutes explicitly support the Service's authority to levy upon property in which a delinquent taxpayer has only a partial interest. Section 6331(a) authorizes levy upon "all property and rights to property" belonging to a taxpayer, except such property as is made exempt by Section 6334, and Section 7403 authorizes a suit to enforce a tax lien against property "in which [the taxpayer] has any right, title, or interest." In short, the enforcement of a federal tax lien raises a question of federal law that is governed by federal statute; it is not a question of state law.

The characterization of respondents' homestead interests under state law is therefore entirely irrelevant to the question whether a tax lien against taxpayers' admitted interests in the property can be enforced. The federal tax collection statutes contemplate that a taxpayer's interests in property may be less than fee ownership. As a result, a lien attaches, not only to the taxpayer's property, but also to his "rights to property," and the lien may be enforced by levy against his property and "rights to property" or by foreclosure against property "in which he has any right, title, or interest." Thus, the fact that a taxpayer is not the sole owner of property does not insulate his interest, however extensive or limited, from federal tax collection procedures. Indeed, the fact that other parties share rights of possession, ownership and control over property with a delinquent taxpayer does not automatically prevent the United States from enforcing its tax lien against such property. For example, in the case of community property, such as the real property involved here, not only may the government's tax lien be enforced, but the entire property may be subjected to the

payment of either spouse's federal tax liability. *Broday* v. *United States*, 455 F.2d 1097, 1100-1101 (5th Cir. 1972) (applying to Texas community property the rule in *United States* v. *Mitchell*, *supra*);[22] see also Tex. Fam. Code Ann. tit. 1, § 5.61(c) (Vernon 1975); *Cockerham* v. *Cockerham*, 527 S.W.2d 162, 171 (Tex. 1975); *Mulcahy* v. *United States*, 388 F.2d 300, 302 (5th Cir. 1968); compare *United States* v. *Overman*, 424 F.2d 1142 (9th Cir. 1970); *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1970).

Moreover, since Congress has not provided an exemption for homesteads in the exclusive enumeration of exemptions from levy set forth in Section 6334(a) of the Code and the exclusion of homesteads generally from the list of exemptions, the particular characterization given a homestead exemption under state law can not be controlling for federal tax collection purposes. It therefore makes no difference that homestead rights which prevent a creditor from reaching the interests of a spouse are characterized as property rights, or as an exemption under Texas law. In either case, the property rights of a taxpayer, however extensive or limited, may be reached to satisfy his federal tax liabilities. While the state's characterization of its homestead provisions may be effective for purposes of state law, it is ineffective in matters of federal

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[22] The court below sought to distinguish the community property principle set forth in *Broday* on the ground that it did not involve property claimed as a homestead (Pet. App. 18a n.15). But there is no basis for that distinction. As the Fifth Circuit properly recognized in *Broday* (455 F.2d at 1101), this Court's decision in *Mitchell* makes clear that the right of the government to enforce its tax lien is not dependent upon state laws that regulate the rights of creditors and does not depend upon whether the "exemption" label is applied. The property involved in these cases was admittedly community property and state homestead law does not insulate such property from the enforcement of a federal tax lien.

taxes and federal tax collection.[23] *Morgan* v. *Commissioner*, 309 U.S. 78, 80-81 (1940); *United States* v. *Mitch-*

[23] Moreover, the court's reading of the Texas case law with respect to homesteads is not free from doubt. The Texas homestead provision protects the business and home of the urban homestead claimant from forced sale (to the extent the lot or lots on which it is located do not exceed a stated value) and imposes a joint consent requirement for alienation. As the court of appeals noted (Pet. App. 5a), Section 50 of the Constitution of the State of Texas, Article 16, provides in relevant part that "[t]he homestead of a family * * * shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof * * *" and other specified obligations. In addition, Section 50 prohibits the conveyance of the homestead without the consent of both spouses. Section 51 defines the extent of homestead protection, specifying that in the case of an urban homestead the "lot or lots" which comprise it are "not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any improvements thereon," and must be used "for the purpose of a home, or as a place to exercise the calling or business of the homestead claimant."

Furthermore, Section 52 provides that upon the death of one spouse "the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution," but that the property shall not be partitioned among the heirs during the lifetime of the surviving spouse or as long as the survivor elects "to use or occupy the same as a homestead." Section 52 provides also for protection of the homestead as long as the guardian of minor children is permitted by a court to use and occupy the property.

Since the characterization of homestead rights applied by the Supreme Court of Texas appears to depend upon the context in which the issue arises, it would appear to be an uncertain basis upon which to premise the federal government's authority to collect tax assessments. In describing the nature of homestead rights in cases involving a creditor's enforcement of liens against the excess value of a homestead, the Supreme Court of Texas has characterized the homestead right involved as an exemption. See, *e.g.*, *Love* v. *Hoffman*, 499 S.W.2d 295 (Tex.), aff'g per curiam 494 S.W.2d 591 (Tex. Civ. App. 1973); see also *Burk Royalty Co.* v. *Riley*, 475 S.W.2d 566,

ell, supra; see *United States* v. *Acri*, 348 U.S. 211, 213 (1955); *Glass City Bank* v. *United States*, 326 U.S. 265,

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567 (Tex. 1972) (characterizing the homestead right involved as an exemption in circumstances in which divorce had terminated homestead interests); *Bank of Texas* v. *Laguarta*, 565 S.W.2d 363 (Tex. Civ. App. 1978).

Where the division of marital property in divorce proceedings is concerned, the Supreme Court of Texas has made it clear that homestead rights do not disturb the ownership of property. Title to separate property remains vested in the spouse who owns the property. *Eggemeyer* v. *Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977); see also *Buchan* v. *Buchan*, 592 S.W.2d 367, 370 (Tex. Civ. App. 1979); compare *Evans* v. *Mills*, 67 F.2d 840 (5th Cir. 1933) (stating that a homestead interest in Texas is not a mere exemption, but rather it is "title in the land"). In describing a survivor's right to avoid partition of homestead property, sometimes called the probate homestead, the Supreme Court of Texas has stated that the right involved is one in the nature of a life estate. *Williams* v. *Williams*, 569 S.W.2d 867, 869 (Tex. 1978). In holding that a husband, who after divorce provided for two minor children, was entitled to avoid creditor's claims even after the children were grown, the Supreme Court of Texas described the homestead right as "an estate in land." *Woods* v. *Alvarado State Bank*, 118 Tex. 586, 594, 19 S.W.2d 35 (1929); compare *O'Neil* v. *Mack Trucks, Inc.*, 542 S.W.2d 112, 114 (Tex. 1976) (stating that "the homestead right, when fixed, is an estate in land exempt from execution").

Here, the tax liens in *Rodgers* attached to the realty while respondent and her first husband (the taxpayer husband) were living on the property. Thus, respondent's survivorship rights were then contingent, not vested. See *Shambaugh* v. *Scofield*, *supra*, 132 F.2d at 346. The property was encumbered by the tax lien before the taxpayer's death and her survivorship rights were necessarily subordinate to it. *United States* v. *Bess*, *supra*, 357 U.S. at 57; *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 275 (5th Cir. 1976); see also, L. Simpkins, *Texas Family Law with Forms* § 36:6 at 44-45 (5th ed. 1977). Accordingly, the rights of the survivor under the Texas provision, which are often described in Texas cases as an estate in land, are irrelevant to the enforceability of the tax lien. See *Williams* v.

268 (1945). Once it has been determined that a taxpayer possesses homestead property or rights to such property under state law, the fact that his spouse likewise possesses an interest in the property that qualifies as a homestead under state law cannot insulate the taxpayer's interest in such property from federal tax collection procedures. The role of the state homestead law is necessarily limited to affording protection against private creditors' claims. "This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes." *Aquilino* v. *United States*, *supra*, 363 U.S. at 514.

II

A FEDERAL COURT IN A FORECLOSURE ACTION BROUGHT BY THE UNITED STATES UNDER SECTION 7403(c) OF THE INTERNAL REVENUE CODE IS EMPOWERED TO ORDER THE SALE OF HOMESTEAD REAL PROPERTY TO ENFORCE A FEDERAL TAX LIEN THAT ATTACHES TO A DELINQUENT TAXPAYER'S INTEREST IN THE PROPERTY, WHERE THE SPOUSE OCCUPYING THE HOMESTEAD DOES NOT HAVE OUTSTANDING TAX LIABILITIES

A. In refusing to enforce admittedly valid tax liens that attached to a taxpayer's interest in a homestead property, the court below, in the second step of its analy-

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Williams, *supra*, 569 S.W.2d at 869; *Sparks* v. *Robertson*, 203 S.W.2d 622 (Tex. Civ. App. 1947).

Similarly, in *Ingram*, the tax liens attached to the realty while respondent and her ex-husband (the taxpayer) were living on the property during their marriage. Thus, Donald Ingram's transfer of the realty to respondent pursuant to the divorce settlement and the fire insurance proceeds for the loss of the realty did not defeat the government's tax liens.

sis, relied upon the additional ground that a federal court is not authorized in a foreclosure action pursuant to Section 7403(c) of the Code to order the sale of jointly owned property where the remaining joint owners are not delinquent taxpayers. In so holding, the court followed its earlier decision in *Folsom* v. *United States*, 306 F.2d 361 (1962), that a federal tax lien attaches only to the delinquent taxpayer's interest in property, and that Section 7403 authorizes enforcement of that lien only by action against the delinquent taypayer's interest in the property (see Pet. App. 16a).[24]

The terms of Section 7403, however, plainly authorize the sale of the property in which persons other than the delinquent taxpayers have an interest. Section 7403(a) broadly authorizes the Attorney General to direct a civil action to be filed in a federal district court "to enforce the lien of the United States * * * with respect to such tax or liability or to subject *any property, o[f] whatever nature of the delinquent, or in which he has any right, title, or interest*, to the payment of such tax or liability" (emphasis supplied). Section 7403(b) is equally explicit with respect to the application of foreclosure proceedings on property in which the taxpayer does not have the sole interest. It requires that "[a]ll persons having liens upon or claiming any interest in the property" be made parties to the action. Finally, Section 7403(c) empowers the court to order "a sale of such property"—not the sale of only taxpayer's interest in it—and directs the court to distribute "the proceeds of such sale according to the find-

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[24] In *United States* v. *Raudry*, 82-1 U.S.T.C. ¶ 9231 (W.D. Tex. Oct. 7, 1981), appeal pending, No. 82-1080 (filed Feb. 10, 1982 5th Cir.), the court refused to permit foreclosure against real property held by taxpayer and his former wife as joint tenants, citing *Folsom* and interpreting it, as the court below did here, to authorize judicial refusal to enforce a tax lien.

ings of the court in respect to the interests of the parties and of the United States." Thus, the statute expressly authorizes a district court to subject the interests of persons other than the taxpayer to an involuntary sale in the course of enforcing the government's lien on the taxpayer's interest in the property. *United States* v. *Overman*, 424 F.2d 1142, 1147 (9th Cir. 1970).[25]

As the court below acknowledged (Pet. App. 16a & n.12), it stands alone in its restrictive interpretation of Section 7403. Four other courts of appeals—the Second, Fourth, Seventh and Ninth Circuits—have upheld the authority of the federal courts to order the sale of jointly held property to satisfy the tax liabilities of one of the joint owners as consistent with the terms of Section 7403. *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Overman*, *supra*; *United States* v. *Kocher*, 468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973); see also *In re Ackerman*, 424 F.2d 1148, 1149-1150 (9th Cir. 1970). See *United States* v. *Eaves*, 499 F.2d 869, 870-871 (10th Cir. 1974).

Furthermore, under the decision below, the remedies available to the government in a Section 7403 action are dependent upon the rights the taxpayer has against the joint owners under state law. Thus, in *Folsom*, the court below held that the government was required first to acquire the taxpayer's interest in the jointly held property and then seek partition. If the government were accordingly forced to acquire a delinquent taxpayer's in-

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[25] Of course, the interests established by parties other than the government will be given due regard in the order of distribution of the proceeds of sale. 26 U.S.C. 7403(c); *United States* v. *Overman*, *supra*, 424 F.2d at 1147.

terest in jointly held property, and then seek partition under state law, it might well require separate law suits, which would undoubtedly reduce the financial recovery of the government and also injure the taxpayer, insofar as the sale of his property interests would yield a lesser amount. Surely Congress did not intend the tax collector to suffer delay by having to await the termination of the occupancy of a homestead, or having to assume partnership or other partial interests in property together with a delinquent taxpayer's spouse or co-owners, in order to garner the uncertain yields of partition. The plain language of Section 7403 authorizes the forced sale of "property" in which a delinquent taxpayer has an interest; it does not restrict the federal courts to the granting of remedies available under state law.

B. *United States* v. *Boyd*, 246 F.2d 477, 481 (5th Cir.), cert. denied, 355 U.S. 889 (1957), and *United States* v. *Morrison*, 247 F.2d 285, 289-290 (5th Cir. 1957), upon which the court below relied (Pet. App. 16a-17a), do not support the broad proposition that a federal court has equitable discretion to refuse to enforce a valid and valuable [26] federal tax lien against an interest in property admittedly belonging to the taxpayer. In *Boyd*, the court simply indicated that the district court had discretion not to order foreclosure if the tax lien did not exist, or was junior to other liens that would exhaust the value of the property, or if the property did not belong to the taxpayer. In those circumstances, "a decree of foreclosure would be neither appropriate nor effective" (246 F.2d at 481). Similarly, the reference to equitable discretion in *Morrison* was to the district court's ability in quiet title

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[26] The term "valuable lien" refers to a lien on property which has sufficient value to satisfy it and any other creditors' interests that are senior to it.

actions under 28 U.S.C. 2410 to take appropriate action in the event the government's lien against the property involved did not entitle it to relief.[27] In this regard, the court correctly stated (247 F.2d at 291):

> There is no hazard to the revenues in the course which we approve. If the Court on sufficient evidence under controlling legal principles concludes that the Government has no lien, a foreclosure is unnecessary to remove the cloud of the asserted lien from the title, and the Government, in fact, had lost nothing. It will not be different if, on the other hand, the Court were to find that the Government lien does exist and has not been, by valid action prior to the Section 2410 suit, extinguished by a valid foreclosure. *As to such lien, whether superior, equal to, or inferior to the competing lien, the Court, if the posture of the controversy is such that the legal determination of the priorities itself is not a full solution, can, under its traditional flexibility* as well as that specified in paragraph (c), Section 2410, * * * *take whatever action is necessary to assure that the Government's lien is fully and effectually respected in accordance with its established rank.* This might take the form of the judicial ascertainment of values to determine whether there was any real equity over and above the prior lien, whether Government or private. For if it is established to a judicial certainty that nought would be gained by a judicial sale, nought would be lost by declining to compel a needless unproductive act. [Emphasis supplied.]

Far from sanctioning the refusal to enforce a valid and valuable federal tax lien, the court in *Morrison* limited its holding to situations in which enforcement of the lien would have been futile.

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[27] Under 28 U.S.C. 2410, a private party who brings an action that affects property on which the United States has or claims a lien may name the United States as a party.

The ruling below goes well beyond the court's prior observations in *Boyd* and *Morrison*. Here, the court below, as an exercise of its equitable powers, refused to enforce a valid federal tax lien against the taxpayer's admitted interest in a homestead, in order to vindicate the nontaxpayer spouse's rights under the state homestead laws.[28] But such a decision undermines the uniform rules that Congress sought to establish for the exemption of property from federal tax collection, and necessarily invites further judicial incursions against the Treasury's tax collection authority. Although cast in terms of "equitable discretion," the decision below creates a new exemption for certain state homestead interests and thereby frustrates Congress's intent to provide a limited and narrow set of exemptions from federal tax collection procedures.[29] Whether valid federal tax liens are to be enforced in foreclosure actions brought by the government under Section 7403 against property that is not exempt under federal law is a statutory question, not a question consigned to the equitable discretion of the district court. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 339 (1906); *Pan American Co.* v. *United States*,

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[28] Ironically, in the only case in which the issue has been presented to it, the Supreme Court of Texas barred enforcement of a federal tax lien only as against the nontaxpayer's community interest in a homestead. *Paddock* v. *Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949).

[29] The explicit terms of Section 6331(a) make it clear that there are no exemptions from levy other than those recognized by Congress in Section 6334. Barring foreclosure as a remedy where state homestead exemptions are involved, may well inure to the detriment of both taxpayer and the government by discouraging purchasers, who wish to avoid litigation regarding the nontaxpayer's interest in the property as well as the interests of any creditors, and by diminishing the amount realized from the sale of taxpayer's interest pursuant to a levy. See *Herndon* v. *United States*, *supra*, 501 F.2d at 1223-1224 (Ross, J., concurring).

273 U.S. 456, 506 (1927); *Scaife Co.* v. *Commissioner*, 314 U.S. 459, 462 (1941); see also, *United States* v. *Stutsman County Implement Co.*, 274 F.2d 733, 735-736 (8th Cir. 1960); *United States* v. *Second National Bank of North Miami*, 502 F.2d 535, 548 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975). The federal tax collection rules established by Congress demand fair and predictably uniform application without regard to the unrelated requirements of state law.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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No. 81-1476

In The

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner

v.

LUCILLE MITZI BOSCO RODGERS individually and as surviving spouse of Philip S. Bosco; Philip S. Bosco, Jr.; Analynne Bosco Dorethy; and Joe Colleta,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the District Court, in an action brought under Section 7403(c) of the Internal Revenue Code to enforce a federal tax lien of a delinquent taxpayer, may foreclose the separate homestead estate of the taxpayer's surviving spouse who does not have outstanding tax liabilities, when the homestead interest is her separate property and is not jointly owned with the taxpayer.

2. Even if the nontaxpayer wife and taxpayer husband are deemed to own jointly the homestead estate of the wife, whether Section 7403(c) of the Internal Revenue Code compels the District Court to foreclose the federal tax lien when the government brings a foreclosure action.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT

In 1955, Respondent Lucille Mitzi Bosco Rodgers and her husband at that time, Philip D. Bosco, acquired as community property a residence in Dallas, Texas. They occupied the residence with their children as their homestead. (Pet. App. 1a-2a). In 1971 and 1972, the federal government made assessments against Philip S. Bosco for federal wagering taxes in the amount of $927,284.79, plus penalties and interest, for the taxable years 1966 through 1971. *Id.* at 2a.

When Philip S. Bosco died in 1974, these taxes remained unpaid, as they do today. *Id.* Mrs. Rodgers herself does not have any federal tax liability. *Id.*

After her husband's death, Mrs. Rodgers continued to occupy the residence as her homestead. Her children of the marriage have since married. Mrs. Rodgers has remarried and now resides in the residence with her second husband. She plans to continue to maintain the residence as her homestead. (R. 35, 40). At the time this suit was filed, she held no property belonging to her deceased husband other than his community property interest in the homestead and certain personal property of less than $500.00 in value. *Id.*

On September 23, 1977, the government instituted suit in the United States District Court for the Northern District of Texas to: (1) reduce to judgment the tax assessment made against Mrs. Rodgers' deceased husband; (2) enforce federal tax liens against all property belonging to deceased taxpayer, including his community property interest in the Texas homestead of Mrs. Rodgers; and (3) obtain a deficiency judgment for any unsatisfied tax liability of deceased taxpayer. Respondents, Mrs. Rodgers, her two adult children, and the executor of her deceased husband's estate, moved for summary judgment on the ground that federal tax liens against her deceased husband may not defeat Mrs. Rodgers' homestead interest. (Pet. App. at 2a). They also asserted that they were entitled to recovery, under 42 U.S.C. § 1988 (1976), attorney's fees in the amount of $3,000.00. (Pet. App. 23a-24a). The government filed a cross-motion for partial summary judgment on the questions whether a federal tax lien could be enforced against Respondent's homestead and whether Respondents were entitled to recover attorney's fees. *Id.* at 3a.

On August 2, 1979, the District Court denied the government's motion and granted summary judgment in favor of Respondents. *Id.* The District Court also awarded Respondents attorney's fees. *Id.* The government filed notice of appeal from the District Court's summary judgment for Respondents and award of attorney's fees. The government then filed a second appeal of the District Court's amended judgment after the District Court granted the government's motion to alter or amend the District Court's earlier judgment to one of only partial judgment in favor of Respondents. *Id.* These two appeals were consolidated in the Court of Appeals below. *Id.*

The Court of Appeals for the Fifth Circuit affirmed the granting of summary judgment refusing foreclosure and reversed the award of attorney's fees. (Pet. App. 1a-24a).

The Court of Appeals held that there can be no foreclosure of a nontaxpayer spouse's homestead interest when the taxpayer spouse is solely liable for the tax liability since, in Texas, homestead interests are estates in land. *Id.* at 19a-23a. *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929); and *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949).

The Court of Appeals said its prior decision in *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963), the decisions of the Tenth Circuit in *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973) and *Jones v. Kemp*, 144 F.2d 478 (10th Cir. 1944) and the decision of the Ninth Circuit in *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964) are in accord with its conclusion in the decision below. *Id.* at 12a-14a. In essence, the Court of Appeals recognized that the majority of the other decisions adopt the test of whether the underlying state law

characterizes the homestead property as merely an exemption from creditors or an estate in land. In the former case, there can be foreclosure of the nontaxpayer spouse's interest in the homestead. In the latter case, the Court of Appeals said there could be no foreclosure. *Id.* at 9a-14a.

The Court of Appeals below also concluded Congress intended for the District Court to exercise its equitable powers in deciding whether to order foreclosure under the provisions of Section 7403(c) of the Internal Revenue Code of 1954. *Id.* at 16a-17a. The Court of Appeals relied upon *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957), *cert. denied*, 355 U.S. 889 (1957) and *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957). *Id.*

SUMMARY OF ARGUMENT

I. The authority of the District Court to order foreclosure by virtue of Section 7403(c) of the Internal Revenue Code does not extend to foreclosing on property separately owned by another and in which the taxpayer does not have an interest. Here, Respondent's homestead property is hers, and hers only. Her deceased husband, the taxpayer, did not own any interest in her homestead, it was uniquely hers. Therefore, Section 7403(c) of the Internal Revenue Code does not authorize the District Court to compel foreclosure.

   A. By virtue of the Texas Constitution, Respondent has a separate vested estate in the homestead, which arose at the time of the acquisition of the homestead, and she may not have that interest foreclosed to satisfy the tax debts of another person. Tex. Const. art XVI, §§50, 51, 52 (Vernon 1955).

1. Pursuant to the Texas Constitution, and numerous decisions of the Texas Supreme Court on the issue, the homestead right of Respondent is an estate in land, singularly hers and separate from any interest her husband might own in the community homestead. *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929); *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 423 (1949).

2. There are two homesteads in Texas, an estate in land and an exemption from creditors. Since Respondent's interest in the homestead is her estate in land, her deceased taxpayer husband had no interest in her homestead.

3. Several decisions have considered the precise issue in this case, and are in agreement with Respondent. *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973); *Paddock v. Siemoneit, supra.*, *Morgan v. Moynahan*, 86 F. Supp. 522 (S.D. Tex. 1949).

B. Since Respondent's homestead interest is a separate vested life estate, not merely an exemption from creditors, her deceased taxpayer husband's tax liability may not be enforced against her homestead interest.

1. The correct test in a majority of decisions is whether state law characterizes the homestead as an exemption from creditors or an estate in land. *United States v. Heffron*, 158 F.2d 657 (9th Cir.), *cert. denied*, 331 U.S. 831 (1947); *United States v. Hershberger, supra.*, *Weitzner v. United*

States, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963).

2. This distinction of state law (i.e. does state law characterize the homestead as a property right or exemption) is the proper decisional test because, if state law views the homestead as an estate in land, then property rights vest in a third person not liable for the tax.

II. Even if the interest of the deceased husband taxpayer could be viewed as a joint interest in the homestead of Respondent, Section 7403(c) of the Internal Revenue Code does not compel foreclosure, but only authorizes foreclosure if the District Court concludes that "substantial justice" is to be done by ordering foreclosure. The District Court is to exercise its equitable discretion in acting under Section 7403(c) of the Internal Revenue Code. *United States v. Boyd*, 246 F.2d 477 (5th Cir.), *cert. denied*, 335 U.S. 889 (1957); *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970).

ARGUMENT

The heart of the government's brief presents the following arguments:

1. Congress has vested in the Internal Revenue Service broad powers to collect delinquent taxes, without re-

gard to state law provisions governing rights of private creditors. (Pet. Br. at 14-15).[1]

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[1]Specifically Sections 6321 and 6322 of the Internal Revenue Code of 1954 (See Appendix A, *infra.*, at A-1) provide that if a taxpayer neglects or refuses to pay federal taxes upon assessment, notice and demand by the government, a federal tax lien arises upon "all property and rights to property" belonging to the taxpayer. I.R.C. §§6321, 6322 (1976). Also, Section 7403(a) of the Internal Revenue Code, (see, Appendix A. *infra.* p. A-1), authorizes the Secretary of the Treasury or his delegate to bring an action to enforce a tax lien "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest" to the payment of his taxes. I.R.C. §7403(a) (West Supp. 1982).

Enforcement of the federal tax lien can only come from "property" or "rights to property" of the taxpayer. *Aquilino v. United States,* 363 U.S. 509 (1960); *United States v. Bess,* 357 U.S. 51 (1958); *Morgan v. Commissioner,* 309 U.S. 78 (1939); *Broday v. United States,* 455 F.2d 1097, 1099 (5th Cir. 1972).

In providing for enforcement of the lien upon property or rights to property of every delinquent taxpayer, the operative statutes furnish no other standard or definition of what constitutes taxpayer's property or rights to property. I.R.C. §§6321, 6322 (1976). This Court has interpreted the word "of" in an analogous tax statute to mean ownership. *Poe v. Seaborn,* 282 U.S. 101, (1930). *Poe* was one of five cases instituted by the government to determine whether, under the Revenue Acts of 1926 and 1928, married taxpayers in the states of Washington, Arizona, Texas, Louisiana and California were entitled to split the community income equally for income tax purposes. *Poe v. Seaborn,* 282 U.S. 101, 109 (1930) (Washington); *Goodell v. Koch,* 282 U.S. 118 (1930) (Arizona); *Hopkins v. Bacon,* 282 U.S. 122 (1930) (Texas); *Bender v. Pfaff,* 282 U.S. 127 (1930) (Louisiana); *United States v. Malcolm,* 282 U.S. 792 (1931) (California). The decisions in these cases confirmed the right of married taxpayers in community property states to divide community income equally between them and to report their respective shares of the income in separate returns. Therefore, the examination must first begin with a determination of the property or rights to property owned by Respondent's deceased taxpayer husband.

(a) Once the tax lien attaches to taxpayer's interest in property,[2] subsequently arising interests do not affect the lien. (Pet. Br. at 15).

(b) The Internal Revenue Code specifically exempts certain assets from levy, and no other assets can be exempt. (Pet. Br. at 16).

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[2]Once taxpayer's property is determined under state law, the tax lien must then attach to it. *United States v. Mitchell*, 403 U.S. 190 (1971); *Broday v. United States*, 455 F.2d 1097 (5th Cir. 1972) (Texas law); *United States v. Overman*, 424 F.2d 1142, 1145 (9th Cir. 1970) (Washington law); *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1980) (Arizona law). Federal law proscribes any attempt by the government to attach its lien to anything more than taxpayer's property.

The Ninth Circuit in *Overman*, in dealing with non-homestead community property, expressed the rule most succinctly:

> Under Washington law, as we have earlier stated, each spouse has an undivided one-half interest in the marital community. The Government cannot claim from the proceeds of sale more than the share of the proceeds attributable to the taxpayer's one-half interest in the asset. It cannot reach the proceeds attributable to the wife's interest. Her interest was not subject to attachment for her husband's premarital tax debt, and the Government's right to share in the proceeds of sale does not exceed the taxpayer's interest in the property subject to the lien. (citation's and footnotes omitted)

424 F.2d at 1146.

The *Broday*, *Overman*, and *Ackerman* cases involved essentially the same facts. In each case, one of the spouses had pre-marital tax debts. The Government attempted to satisfy its lien from non-homestead community property: in *Broday*, the assets sought were dividends; in *Overman* the assets were unspecified community property; and in *Ackerman*, the assets were proceeds from the sale of a note and common stock. In all three cases, federal courts held that the government's tax lien attached only to the taxpayer's one-half interest in the community property, and not to the community one-half interest of the non-taxpayer spouse.

Tillery v. Parks, 630 F.2d 775 (10th Cir. 1980) holds that the husband's tax lien attaches to his interest in the homestead, and has facts similar to the instant case. It is merely an attachment case. Foreclosure of the homestead was not an issue.

2. Although state law defines the property or rights to property owned by a taxpayer,[3] state exemptions from creditors do not insulate a taxpayer's property from collection and forced sale to satisfy his federal tax liability. (Pet. Br. at 22).

3. Once the tax lien attaches to taxpayer's interest in the homestead, it may be foreclosed (Pet. Br. at 31-33).

Respondent agrees with these arguments. They all represent sound legal principles. Unfortunately, they do not focus on

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[3]The rule has long been established in this Court that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute." *Morgan v. Commissioner*, 309 U.S. 7, 8 (1939), *quoted with approval in Aquilino v. United States*, 363 U.S. 509, 513 (1960); *Slodov v. United States*, 436 U.S. 238, 256, n. 19 (1978).

This Court has also declared that the earlier, but identical, version of Section 6321 of the Internal Revenue Code "creates no property rights but merely attaches consequences, federally defined, to rights created under state law . . ." *United States v. Bess*, 357 U.S. 51, 55 (1958), *quoted with approval in Aquilino v. United States*, 363 U.S. 509, 513 (1960). Only after state law ascertains taxpayer's property rights will federal law determine whether the tax lien will attach and be enforceable against taxpayer's property. *United States v. Mitchell*, 403 U.S. 190, 204-05 (1971); *Accord, Burnet v. Harmel*, 287 U.S. 103, 110 (1932); *Morgan v. Commissioner*, 309 U.S. 78, 80-81 (1939); *Helvering v. Stuart*, 317 U.S. 154, 162 (1942); *Commissioner v. Harmon*, 323 U.S. 44, 50-51 (1944) (Douglas, J., dissenting).

In interpreting state law to define property interests, this Court has deferred to conclusions of the Court of Appeals:

> In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable.

Propper v. Clark, 337 U.S. 472, 486-87 (1948); *quoted with approval in United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *see also Estate of Spiegel v. Comm'r*, 335 U.S. 701, 707-08 (1949); *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

The author of the decision below, Circuit Judge Jerre S. Williams, is a noted authority on Texas law, a member of long standing of the Texas bar and a prestigious leader of the Texas academic legal community.

the central issue in this case, and, therefore, are irrelevant. The single issue is whether the government may satisfy the tax liability of one person from the property of another.

I. A DISTRICT COURT, IN AN ACTION BROUGHT UNDER SECTION 7403(c) OF THE INTERNAL REVENUE CODE OF 1954 TO ENFORCE A FEDERAL TAX LIEN OF A DELINQUENT TAXPAYER, MAY NOT FORECLOSE THE SEPARATE HOMESTEAD PROPERTY OF THE SURVIVING SPOUSE WHO DOES NOT HAVE OUTSTANDING TAX LIABILITIES, BECAUSE THE HOMESTEAD INTEREST IS HER SEPARATE PROPERTY AND IS NOT JOINTLY OWNED PROPERTY WITH THE TAXPAYER SPOUSE.

A. *There can be no foreclosure against Respondent's separate, vested life estate in the homestead because Respondent's deceased taxpayer husband had no property or rights to property in her homestead, which, in Texas, constitutes an estate in land.*

We agree with the government's lengthy and strenuous arguments that it can foreclose its tax lien from taxpayer's interest in the homestead, (Pet. Br. at 31-33), but this argument has missed the point. Since, in Texas, a homestead estate of a surviving wife is an estate in land belonging only to her, there can be no foreclosure of her separate property (i.e. her homestead) to satisfy the tax debts of another, including the sole tax liability of her deceased husband.

Respondent's homestead estate derives from Article XVI, Sections 50, 51 and 52 of the Constitution of the State of Texas, all of which have been constitutional law in Texas

for over 100 years.[4] (See Appendix C, *infra.* at C-1, 2). These provisions vest in the surviving spouse the right to use and possess the entire homestead for her life, without any fear of the homestead being partitioned. Tex. Const. art XVI, § 52 (Vernon 1955). Moreover, she cannot be divested of her homestead except by alienation, abandonment or death. *Paddock v. Siemoneit*, 147 Tex. 571, 585, 218 S.W.2d 428, 436 (1949).

Although the government doubts that Respondent's homestead is an estate in land, (Pet. Br. at 38 n. 23), the Texas Supreme Court has exhibited little hesitation in holding that the homestead of the surviving spouse is an estate. *Paddock v. Siemoneit*, 218 S.W.2d at 436, *Woods v. Alvarado State Bank*, 118 Tex. 586, 19 S.W.2d 35 (1929). *See also, Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943).

In *Woods, supra.*, the seminal decision on this point, the Texas Supreme Court, in deciding that the homestead rights of a father were not destroyed even though the father had been divorced, and his children had moved away from the

[4]There are two homesteads in Texas. There is both a homestead exemption from creditors, and a homestead estate. The part of homestead law representing an exemption from creditors originates from Act of January 26, 1839 [1838-1840], *Laws of Republic of Texas*, 3d Cong., 1st Sess. 113 (See Appendix B, infra. p. B-1); Haskins, *Homestead Exemptions*, 63 Harv. L. Rev. 1289 (1950); *Cobbs v. Coleman*, 14 Tex. 598 (1855), which was the first homestead statute in the Republic of Texas, prior to statehood, and became part of the first Constitution of the State of Texas following statehood. Tex. Const. art. VII, § 22 (1845), 2 H. Gammel, *Laws of Texas* 1294 (1898). *See Woods v. Wheeler*, 7 Tex. 13 (1851). In a separate and distinct development, the homestead estate vesting survivorship rights in homestead property was a separate statute, first appearing in 1843, 1843 *Laws of Republic of Texas*, An Act to Amend the Probate Law, at 14, 2 H. Gammel, *Laws of Texas* 1623 (1898), and not becoming a part of the Texas Constitution until 1876, some 31 years after the homestead exemption entered the constitution. Tex. Const. art. XVI, § 52, 8 H. Gammel, *Laws of Texas* 833 (1898). These independent statutory and constitutional beginnings support the separateness of the homestead exemption rule from the homestead estate rule.

home, emphatically concluded that a separate, vested life estate in the homestead was created in each spouse upon acquisition of the homestead. In so holding, the court summarized the homestead property rights of each spouse as follows:

> In view of our constitutional and statutory provisions concerning homestead rights we have concluded that in this state the homestead is to be regarded as an estate created not only for the protection of the family as a whole, but for the units of the family . . . as distinguished from a mere privilege accorded to the head of the family
> . . . .

19 S.W. 2d at 36.

> Since the homestead right is an estate in land, it follows that the holder of the homestead estate cannot be divested of his right except by alienation or abandonment
> . . . .

Id. at 38.

The Texas Supreme Court, in *Woods*, presents a thorough and detailed study of the constitutional history of the Texas homestead estate from its inception in 1843. Based upon the literal wording of the constitutional provisions, and their historical development, the homestead of a surviving wife is a separate, vested property right, beginning when the wife and her husband acquired the homestead, and continuing until her abandonment of it or death. Whatever doubts exist with respect to the nature of the homestead estate should be dispelled following a reading of *Woods*.

Twenty years after *Woods*, the Texas Supreme Court again reaffirmed its conclusion and reasoning in a case strikingly similar to the instant case. In *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949), the government intervened in a state court action to foreclose against the wife's homestead in an attempt to satisfy its tax lien, which arose as a result

of the husband's sole tax liability during the marriage. In relying substantially upon *Woods*, the court held that the wife's homestead interest cannot be foreclosed against for the husband's sole tax liability in view of the separate vested nature of the wife's homestead property.

> The wife has a vested estate in land of which she cannot be divested during her life except by abandonment or a voluntary conveyance in the manner prescribed by law. . . . [The] district court erred in decreeing a foreclosure of the lien on the homestead as against Mrs. Siemoneit.

218 S.W.2d at 436. The twin decisions of *Woods* and *Paddock* are convincing that Respondent's homestead is an estate.

The first occasion for the Fifth Circuit to examine the Texas homestead estate was *Evans v. Mills*, 67 F.2d 840 (5th Cir. 1933), a case involving the question of the validity of a mineral lease on homestead minerals executed solely by the husband. The Fifth Circuit decided that the wife's failure to sign the mineral lease made it ineffective because, being an estate in land, both the husband and wife must sign an instrument of conveyance of the homestead, and therefore, the lease of homestead minerals is a conveyance of the homestead. In deciding upon the nature of the Texas homestead estate, the court concluded that:

> A homestead interest in Texas is not, as in some states, a mere exemption. It is a title in the land, of which, according to the settled public policy of the state, the owner may not be deprived except by abandonment or by his conveyance executed as required by statute.

67 F.2d at 841.

Finally, 45 years after it first reviewed the Texas homestead estate in *Evans v. Mills*, the Court of Appeals below held, as it had before, that a Texas homestead interest

is an estate in land. The Fifth Circuit stated that its conclusion was in accordance with "the overwhelming weight of the authority in Texas." *United States v. Rogers* [*sic*], 649 F.2d 1117, 1126 (5th Cir. 1981).

There are abundant other authorities to support Respondent's position that the Texas homestead is an estate in land, individual to her. *See, e.g., O'Neil v. Mack Trucks Inc.*, 542 S.W.2d 112, 114 (Tex. 1976), *recalled on other grounds*, 551 S.W.2d 32 (Tex. 1977) ("Although the issue in the case was whether the defendant has raised the issue of a business homestead properly in the trial court, the Texas Supreme Court said that the 'homestead right, when fixed, is an estate in land exempt from execution.' "); *Rancho Oil Co. v. Powell*, 142 Tex. 63, 71, 175 S.W.2d 960, 965 (1943) ("in the nature of a life estate"); *Cocke v. Conquest*, 120 Tex. 43, 52, 35 S.W.2d 673, 678 (1931) (stating in dicta that the Texas homestead is an estate in land); *Sargeant v. Sargeant*, 118 Tex. 343, 351, 15 S.W.2d 589, 593 (1929) ("It is plainly evident that the [homestead] rights ... constitute ... an estate in land ... [I]t is clear that the homestead right [to surviving spouse] is an estate in land. ..."); *Hargadene v. Whitfield*, 71 Tex. 482, 488, 9 S.W. 475, 478 (1888) ("More than mere privilege of occupancy"); *Williamson v. Kelley*, 444 S.W.2d 311, 314 (Tex. Civ. App. — Ft. Worth 1969, writ ref. n.r.e.) ("The homestead right vested in the widow ... is in the nature of an estate in life-tenancy, though less broad in scope").[5]

[5]The Texas Supreme Court has also measured the homestead estate of a surviving spouse against traditional, common-law definitions of a freehold life estate and concluded that "[w]hen the homestead right is measured by the above definition [of a common law freehold life estate], it is clear to us that the homestead contains every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law." *Sargeant v. Sargeant*, 118 Tex. 343, 352, 15 S.W.2d 589, 593 (1929).

Additionally, leading commentators have agreed that the Texas homestead rights constitute an estate in land. W. H. Nunn, *A Study of the Texas Homestead and Other Exemptions* 15 (1931); L. Simpkins, *Speers Texas Family Law*, § 36:4, at 41, § 36.63, at 212 (5th Ed. 1977).

In accordance with the settled weight of authorities, the Court of Appeals below held that the taxpayer (Respondent's deceased husband) had no property or rights to property in Respondent's homestead and therefore, the government's tax lien may not be foreclosed against Respondent's homestead. (Pet. App. at 23a).

Several different courts have ruled on the same issue presented here. The Tenth Circuit in United States v. *Hershberger*, 475 F.2d 677 (10th Cir. 1973) (Kansas Law), the Texas Supreme Court in *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949), and the District Court for the Southern District of Texas in *Morgan v. Moynahan*, 86 F. Supp. 522 (S.D. Tex. 1949), all decided cases involving facts virtually identical to those in the instant case. In each case only the husband was liable for the tax. In each case the government sought foreclosure of its tax lien against the separate homestead estate of the wife. In each case, the court held that the tax lien was unenforceable against the wife's homestead during her life as long as she occupied her homestead because the wife's homestead property was not property belonging to the person responsible for the tax — the husband.

In *Hershberger*, 475 F.2d 677, the husband and wife resided on a Kansas homestead, but the government sought to enforce its lien by attempting to sell the husband's and wife's interests in the homestead property, even though the lien was solely for the husband's tax liability. The wife argued, as Respondent does here, that, under state homestead law, she was entitled to full use and possession of the homestead

for the remainder of her life and this right was a property right. Accordingly, her homestead property was not subject to the satisfaction of tax debts of others, including tax debts of her husband. The Tenth Circuit agreed with the wife.

In *Paddock*, 218 S.W.2d 428, the trustee of a bankrupt corporation attempted to create a constructive trust on certain real estate and personal property belonging to the corporation against a corporate officer (the taxpayer husband) who "willfully" failed to pay over employment taxes. The government intervened to assert penalty taxes against the husband for failure to pay over these employment taxes. The government sought to enforce these penalty taxes by foreclosing both upon the husband's interest in the homestead and on the separate homestead interest of the wife. The Texas Supreme Court denied the attempted foreclosure against the wife's separate homestead property on the grounds that (i) the federal tax lien of the husband attached only to the community and separate property of the husband (218 S.W.2d at 436), (ii) the wife owned a separate homestead property interest under Texas law, which vested at the moment the homestead was purchased by the husband and wife, and she cannot be divested of this homestead interest during her lifetime, *id.*, and (iii) the separate homestead property of the wife did not belong to the person who was responsible for the tax (her husband) and, hence, could not be used to satisfy the husband's tax liability. *Id.*

In *Morgan*, 86 F. Supp. 522, the Internal Revenue Service sought foreclosure of a husband's and wife's homestead for the husband's unpaid and delinquent income taxes. The District Court refused to allow the government to foreclose on the wife's property because, under Texas law, the wife's homestead interest was a separate property right to which she was entitled to full use and enjoyment. Her property was

not his property, and his lien may not be satisfied except from his property.

An often cited case, *Jones v. Kemp*, 144 F.2d 478 (10th Cir. 1944), also supports Respondent's argument that the homestead of the non-taxpayer wife cannot be used to enforce the delinquent tax liability of the husband, even though the central issue in the case was whether the appellees there were legally married. The Tenth Circuit makes clear in its opinion that:

> [A] wife is granted an indivisible and vested interest in the homestead property, and one in which cannot be subjected to levy and sale for the satisfaction of the Federal tax liability of her husband.

144 F.2d at 480.[6]

These cases, and the decision below, represent sound, logical and equitable reasoning; and they reach correct results. Respondent has lived in her house for over 25 years and she is not liable for the tax debt. Under Texas law, she is entitled to use and enjoyment of the property for her life, and her homestead is her property right.

The government repeatedly suggests that the Court of Appeals below — and the *Hershberger* court as well — improperly focused on Respondent's interest in the property rather than on the taxpayer's interest; and if the government was asking to foreclose only upon the taxpayer's interest in the property, there would be little room for argument on the point. But the government is seeking to foreclose upon (and terminate completely) the separate property interest of a non-taxpayer as well, naturally drawing the focus of attention

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[6] *Jones v. Kemp, supra.*, was followed in *Hershberger, supra.*, and approved in *Paddock, supra.*

to that interest.[7] Thus, by this effort, the government seeks to do no other than to disturb the "proper balance" that this Court has said must exist between the role of the state law in defining property interests and the need for efficient tax administration, *Aquilino v. United States*, 363 U.S. 509 (1960); and the government's attempt should be denied.

The Ninth Circuit, in an analogous circumstance, has refused to allow the Internal Revenue Service to satisfy its tax lien against assets of a joint venture for the tax liability of a venturer on the grounds that "the power of the Collector never extends beyond the right of the taxpayer upon whose property" enforcement is sought. Thus, the "Collector has rights no higher than those of the taxpayer whose rights to property is sought" to enforce the tax liability. *Stuart v. Willis*, 244 F.2d 925, 929 (9th Cir. 1957). The Court of Appeals went on to succinctly state the rule:

> It is one of the principles which must necessarily be observed in the law of taxation as in other fields that the rights and property of third persons must be respected. This is a broad guarantee and . . . . requires that the property of a third person is immune from seizure to enforce the liability of the person owing the tax.

Id.

The Respondent's homestead, says the government, (Pet. Br. at 26), is not a barrier around the taxpayer's home sturdy enough to keep out the Commissioner of Internal

[7]To foreclose on Respondent's homestead estate is to give the government more rights than the taxpayer had in the property. But as has been said before, the "IRS acquires by its lien and levy no greater right to property than the taxpayer himself had at the time the tax lien arises." *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1301 (8th Cir. 1980), *citing United States v. Durham Lumber Co.*, 363 U.S. 522, 525-26 (1960).

Revenue. (Pet. Br. at 261). But by pressing its argument the government reveals its apparent willingness to enter the wrong home in its relentless pursuit of the addictive federal tax dollar. The federal tax collectors are allowed by the governing statutes to invade only the taxpayer's house, not that of another.

B. *When state law treats the homestead interest of the nontaxpayer spouse as an estate in land, not merely an exemption from creditors, a federal tax lien may not be enforced against the homestead interest of the taxpayer spouse when the spouse does not have an outstanding tax liability.*

A determinative issue, drawn by the Court of Appeals below, is whether state law treats the homestead of the nontaxpayer spouse as an estate in land or merely an exemption from creditors. The reason the distinction is significant is because, when separate property interests of others are involved, the federal tax lien simply cannot and does not reach those interests; but when mere exemptions are granted, federal law then becomes determinative as to the effectiveness of the exemptions as against the claims of the tax collector. No other distinction can be utilized without violating prior decisions of this Court. *See, Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1958); *United States v. Mitchell*, 403 U.S. 190 (1971); *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Poe v. Seaborn*, 282 U.S. 101 (1930) and companion cases.[8] All those cases clearly recognize that state law characterizes the property rights of a taxpayer, and the federal government attaches federal tax consequences to those rights.

[8]See note 1, *supra*.

Despite the government's attempt to claim conflict in lower court decisions, and the parade of horribles[9] they predict will come about if this case is affirmed, relying on state characterizations of homestead as a property right or an exemption from creditors is the only rule consistent with this Court's earlier statements on the proper relationship of federal and state law. *Id.* Thus, to do anything else other than to look to how state law defines the homestead would infuse extraordinary power into enforcement of the federal tax lien, a result that is both unwarranted and unnecessary.

An examination of earlier decisions alleged by the government to be conflicting reveal instead a consistent application of this rule. The earlier cases may either be labeled "exemption" or "property right" cases, or they may be ignored. The Ninth Circuit in *United States v. Heffron*, 158 F.2d 657 (9th Cir.), *cert. denied*, 331 U.S. 831 (1947) held that a federal tax lien may be levied against a delinquent taxpayer spouse's one-half interest in the proceeds of the sale by the trustee in bankruptcy of the California homestead of the bankrupt taxpayer and his spouse to satisfy the taxpayer spouse's tax liability because the nontaxpayer spouse was attempting to gain protection from the shield of a California exemption from creditors statute. Hence, the Ninth Circuit stated that exemptions prescribed by state laws are "ineffective" against federal tax liens. *Id.* at 659. The Ninth Circuit decision in *Heffron*, therefore, was an exemption case.

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[9]The consequences of affirmance set forth in footnote 16 of the government's brief are incredibly inaccurate and naive. (Pet. Br. at 31-32). They are based upon the premise that the spouse's homestead property interest remains appurtenant to the real estate after spouse's sale, whereas it is clear that the property interest, as contrasted with the exemption from creditors, terminates completely in the specific real estate when it is sold or transferred. *Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943).

The Tenth Circuit, in *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973), adopted the property right approach. The Court of Appeals held that the nontaxpayer spouse had a homestead interest, which was a property right under state law; under Kansas law the homestead of the nontaxpayer spouse was more than mere exemption from creditors. Accordingly, the Tenth Circuit disallowed foreclosure on the homestead to satisfy the federal tax liability of the taxpayer spouse.

Prior to the Court of Appeals decision below, the Fifth Circuit decided *Shambaugh v. Scofield*, 132 F.2d 345 (5th Cir. 1942), *United States v. Estes*, 450 F.2d 62 (5th Cir. 1971), and *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963). Except for *Shambaugh*, the exemption versus property right distinction was drawn and consistently applied. The precise holding in *Shambaugh* was that, when both spouses are jointly liable for federal income taxes, homestead provisions under Texas law will not prevent foreclosure. *Shambaugh v. Scofield*, 132 F.2d at 346-47. Respondent agrees with *Shambaugh*. The federal tax lien attached to homestead property rights of Mr. and Mrs. Shambaugh. Both were liable for the tax. Each spouse's interest in the property could be foreclosed. The Fifth Circuit in *Shambaugh* did not even address the question of whether the Texas homestead was a property interest or a mere exemption from creditors, or both. Rather, the Court of Appeals decided that the District Court's failure to enjoin the Internal Revenue Service from selling, under warrant of distraint, a Texas homestead owned by both spouses to satisfy their past tax liability was a proper action and affirmed the District Court judgment. The decision did not speak to the issues presented in this case.

Weitzner involved facts similar to *Hershberger*. In 1946, the husband and wife bought a homestead in Florida. Federal

tax assessments were made against only the husband and a notice of tax lien was filed against him in 1954. The husband died in 1956. The government brought suit to foreclose the lien against the property acquired by the husband and wife in 1946. Mrs. Weitzner contended that when she and her husband acquired the property, under Florida law she acquired a vested property interest in the homestead separate and apart from the rights of her husband. It could not be attached for his obligation. The Fifth Circuit tersely resolved the question as follows:

> The resolution of this issue may depend upon whether there is involved a single interest of the taxpayer who is subject to tax liability, or whether both spouses have an interest or only one is under a tax liability. . . . If it is determined that a wife does not have, during the lifetime of her husband, a property right in a homestead where the title is in her name alone, we need proceed no further and the Government should prevail.

309 F.2d at 47-48. The Fifth Circuit then held that under Florida law Mrs. Weitzner did not have any vested property rights, title or interest in the homestead during the life of her husband. The judgment of the District Court directing foreclosure was therefore affiirmed.

Weitzner is consistent with *Hershberger* in that, if the nontaxpayer spouse does not have a vested interest in the homestead at the time the tax lien arises, the property may be foreclosed. It is because Florida homestead amounts to merely an exemption that Mrs. Weitzner was unsuccessful in preventing foreclosure. Hence, *Weitzner* is an exemption case.

Finally, the Fifth Circuit in *United States v. Estes*, 450 F.2d 62 (5th Cir. 1971) faced a situation involving a tax assessment made against both spouses. The lien was filed in

both names and foreclosure of the entire community was sought to satisfy the tax liability of the spouses. There were other issues in *Estes* dealing with the ability of the government to follow the transfer of the husband's homestead interest to a trust for the benefit of taxpayer's children. The Court of Appeals held that Texas law concerning transferee liability was merely an exemption from creditors law, and therefore did not bar the government's enforcement of its tax lien. Hence, foreclosure was allowed. *Estes* is inapplicable to the fact situation presented before this Court, as is *Shambaugh*, because in both cases both spouses were liable for the delinquent taxes.

The only circuit presenting an alleged conflict is the Eighth Circuit, as represented by the two decisions of *United States v. Heasley*, 283 F.2d 422 (8th Cir. 1960) and *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974). In both decisions, the Eighth Circuit held that the government may foreclose its tax lien on the homestead interest of a taxpayer spouse to collect that spouse's unpaid taxes, notwithstanding the nontaxpayer spouse's interest in the homestead property. The *Heasley* decision was an exemption case similar to *Heffron*, holding that state homestead exemptions are of no effect against federal tax liens. *Heasley*, 283 F.2d at 427. The later *Herndon* decision was decided on the basis that even though state homestead law characterized the homestead as a property right, nevertheless the Internal Revenue Code provisions, the Treasury regulations and the Supremacy Clause of the United States Constitution dictate foreclosure of the government's tax lien as against only the taxpayer's interest in property. *Herndon*, 501 F.2d at 1222-23. The foreclosure sale was to be made expressly subject to the separate homestead property rights of the spouse. As a result, the *Herndon* court recognized that the government lien could not affect the state law-decreed prop-

erty rights of the spouse. Despite the government's claim to the contrary, *Herndon* is, therefore, entirely consistent with the other case law and is supportive of Respondent's position in this action. The supposed conflict in the cases as suggested by the government simply does not exist.

Prior to the death of taxpayer husband, Respondent and her husband owned the following property interests in the homestead: the Respondent owned a community one-half interest in the property, and a homestead interest entitling her to full use and possession of the entire homestead (that is, both community one-halves) for her life. Taxpayer owned a community one-half interest in the property, and a separate homestead estate entitling him to full use and possession of the entire community homestead for the remainder of his life. Upon the death of the husband, Respondent continued to own both her community one-half interest, and her homestead interest which entitled her to full use and enjoyment of the indivisible homestead for life. *Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943). Her deceased husband's interest became only a remainder interest in his community one-half, subject to Respondent's homestead life estate in the total community. Both of their interests are appurtenant to the realty, but Respondent's homestead estate is a separate property interest. It entitles her, and no one else, to use and possession of the homestead. Thus, the homestead is her property. She and her deceased husband do not jointly own her homestead life estate. Therefore, Section 7403(c) of the Internal Revenue Code does not entitle the District Court to foreclose the government's tax lien, which attaches to the deceased husband's property, upon the Respondent's homestead life estate. To allow foreclosure would be to do nothing less than to take property of a third party unrelated to any tax liability.

If Respondent's homestead estate were not involved, then hypothetically the Respondent and her husband would own separate community one-half interests in non-homestead property, and Section 7403(c) would empower the District Court to order a sale of the property, with Respondent to receive proceeds equal to her one-half community interest. *See, e.g. Broday v. United States*, 455 F.2d 1097 (5th Cir. 1972). But here, her ownership of a homestead estate creates a unique situation. The wife owns a separate property interest (*i.e.*, the homestead estate) distinct from the underlying community one-half interest of the taxpayer (and therefore, the claim of the government). *Rancho Oil Co. v. Powell*, 142 Tex. 63, 175 S.W.2d 960 (1943). Thus, any foreclosure under Section 7403(c) must wait until Respondent's homestead interest has expired, for only then will taxpayer own a joint interest with Respondent.

This Court does not need to resolve the alleged conflict between *Folsom v. United States*, 306 F.2d 361, 367-68 (5th Cir. 1962) and *United States v. Trilling*, 328 F.2d 699, 702-03 (7th Cir. 1964); *Washington v. United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), *cert. denied*, 402 U.S. 978 (1971); *United States v. Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *United States v. Kocher*, 468 F.2d 503, 506-07 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *In re Ackerman*, 424 F.2d 1148, 1149-50 (9th Cir. 1970); *United States v. Eaves*, 499 F.2d 869, 870-71 (10th Cir. 1974). In essence, those cases all deal with jointly held property sold to satisfy the tax liability of one of the joint owners. Here, there is no jointly held property.Those cases all involve joint owners of the property with all joint owners having the four unities of title. Here, only Respondent has unity of possession. The deceased husband merely has a remainder interest in the homestead. *Rancho Oil Co. v. Powell*, 175 S.W.2d at 965. The

separate homestead life estate interest granted to the wife under Texas homestead law is singularly hers. Therefore, the supposed conflicting decisions do not conflict, and Section 7403(c) of the Internal Revenue Code is unenforceable until Respondent's death or abandonment of the homestead property.

II. EVEN IF NONTAXPAYER WIFE AND TAXPAYER HUSBAND ARE DEEMED TO OWN JOINTLY THE HOMESTEAD PROPERTY, THEN SECTION 7403(c) OF THE INTERNAL REVENUE CODE DOES NOT COMPEL THE DISTRICT COURT TO FORECLOSE THE FEDERAL TAX LIEN WHEN THE GOVERNMENT BRINGS A FORECLOSURE ACTION.

If Section 7403(c) is applicable because Respondent jointly owned the homestead with taxpayer, the District Court, though empowered, is not compelled to order foreclosure. That the District Court has this discretion is abundantly clear from the statute and legislative history.

The pertinent part of the statute provides "and, in all cases, where a claim or interest of the United States therein is established, [the District Court] *may* decree a sale of such property." I.R.C. § 7403(c) (1976) (emphasis added) (See Appendix C, *infra.* at C-2). This language has remained unchanged since 1936 — over 45 years. Prior to 1936, the predecessor statute to Section 7403(c) used the word "shall" instead of "may," and thus the District Court was required to order foreclosure. Revenue Act of 1926, Pub. L. No. 20, §1127, 44 Stat. 9, 123-24 (1926) (current version at I.R.C. § 7403(c) (1976)).

Prior to amendment in 1936, the predecessor statute to Section 7403(c) is shown at left, and the provision following the 1936 amendment reads at right:

Prior to 1936 Amendment	*After 1936 Amendment*
And the said court . . . *shall* decree a sale of such real property, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. Revenue Act of 1926, Pub. L. No. 20, § 1127, 44 Stat. 9, 123-24 (1926) (current version at I.R.C. § 7403(c) (1976)) (emphasis added).	And the said court . . . *may* decree a sale of such property and rights to property and a distribution of the proceeds of such proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. Revenue Act of 1936, Pub. L. No. 740, § 802, 49 Stat. 1648, 1743-44 (1936) (current version at I.R.C. § 7403(c) (1976)) (emphasis added).

In tracing the statutory change in 1936 to Section 3207(a) of the Revised Statutes, the House of Representatives changed the words "real property" to "property" and "rights to property." But the word "shall" was retained by the House. H.R. 12793, 74th Cong., 2d Sess. § 203. (1936). It was not until the bill was sent to the Senate that the word "may" was inserted. H.R. 12395, 74th Cong., 2d Sess. § 253 (1936).

The House of Representatives Ways and Means Committee, in its report (See Appendix D, *infra.* at D-1, 2) to accompany the amendment, expressed fear that the equitable remedy of distraint against personal property was too drastic and damaging a remedy. Hence, it liberalized the statute by extending the statutory remedy of foreclosure of real estate to all of taxpayer's property or rights to property. The report concluded:

> The foreclosing of the government's lien for tax in this manner [against both real and personal property], with the appointment of a receiver in proper cases, would

> permit the interests of all parties to be conserved and would provide for an orderly and equitable disposition of the government's claim for tax.

H.R. Rep. No. 2818, 74th Cong., 2d Sess. 7 (1936).

Clearly, the House of Representatives intended to liberalize and make more equitable foreclosure proceedings against taxpayer's property. The Senate carried on this theme by adding the word "may" to the statute (the 1936 change) clearly vesting the District Court with equitable discretion to order foreclosure, and giving the District Court the power to seek other remedies. The statute and legislative history manifestly reflect a Congressional intention to give District Courts equitable powers to decide whether to order foreclosure. Nothing could be clearer.

When the government brings a foreclosure action under Section 7403(c), the statute has not been applied to require foreclosure of a federal tax lien. *United States v. Boyd*, 246 F.2d 477 (5th Cir.), *cert. denied*, 335 U.S. 889 (1957). *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957). In *Boyd*, a mortgagee conducted a nonjudicial sale to foreclose a valid mortgage lien on a taxpayer's property. In the process of foreclosure by the mortgagee, the government filed an action under Section 7403(c) seeking foreclosure of a tax lien against taxpayer's property. The government there argued that foreclosure of the mortgage did not affect the government's lien, and accordingly the District Court was absolutely required to foreclose and order a judicial sale under Section 7403(c). The Court of Appeals in *Boyd* tersely summarized the government's argument as follows:

> The government meets this headon [sic] and takes the awesome position that when the government files a

> Section 7403 suit to foreclose, the court is inexorably compelled to foreclose, and has no flexible equity power of adaptation and all procedures, valid under state law for judicial or non-judicial foreclosure of mortgages, fall under the weight of the National Sovereigns insatiable, relentless pursuit of its tax collection.

Boyd, 246 F.2d at 481.

The *Boyd* court refused to accept the government arguments and concluded that congressional intent behind Section 7403(c) was to allow courts to function "with the full traditional flexibility of the Chancelor." 246 F.2d at 481. Section 7403(c) grants to courts authority to determine the validity and priority of conflicting liens. But, the statutory language does not compel courts to foreclose federal tax liens. Other equitable remedies are equally available to District Courts under Section 7403(c) (e.g. the appointment of receivers). *Boyd*, 246 F.2d at 481. *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957) reaffirms this conclusion for comparable actions brought by private persons to quiet title against a federal tax lien under 28 U.S.C. § 2410 (1978). The Court of Appeals in *Morrison* illustrated the similarity between Section 7403(c) and Section 2410 by explaining that both statutes were designed by Congress to give federal courts the traditional flexibility to apply requisite and unique relief needed in each situation. 247 F.2d at 290. In both *Morrison* and *Boyd*, the Courts of Appeal refer to the Section 7403(c) language whereby Congress substituted the word "may" for "shall," giving District Courts discretion to determine if foreclosure is necessary. *Boyd*, 246 F.2d at 481; *Morrison*, 247 F.2d at 290, n.6. *Accord, United States v. Eaves*, 499 F.2d 869, 871 (10th Cir. 1974).

In addition, there could not be imagined a more appropriate remedy than deferring to the equitable discretion of

the District Court to order foreclosure. The government balefully argues that its interest in efficient tax administration dictates a compulsion to foreclose. Yet, what of the interests of other property owners? Major economic and business dislocations of other property owners, if foreclosure were compelled, require a balancing of their interests against the government interests. For example, in the extreme case, suppose the delinquent taxpayer owed $250.00 of back taxes and the government's tax lien therefor attached to the taxpayer's interest in a $50 million office building. To agree with government's argument is to endorse the result of ordering a sale of the office building, with attendant economic and tax consequences to other joint property owners, merely to satisfy the $250 tax liability. Though hypothetical and extreme, for emphasis, the example serves to illustrate the wisdom of deferring these matters to the equitable discretion of the District Court, as Congress, in Section 7403(c) has chosen to do. The Ninth Circuit has recognized and affirmed that the Congressional mandate to District Courts via Section 7403(c) is to "work substantial justice among all interested persons" through the exercise of the "broad discretionary powers" conferred upon the courts. *United States v. Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970). *Accord, Tillery v. Parks*, 630 F.2d 775, 777-778 (10th Cir. 1980).

In the instant case the only foreclosure that the District Court could have ordered (had it been requested to do so) was the forced sale of only the taxpayer's interest in the real property in question, which sale would be subject to the Respondent's homestead property rights therein. The sale of such an attenuated future interest would, no doubt, attract little interest from prospective buyers. Thus, this case presents a classic example for the exercise of discretion by the District Court in ordering foreclosure.

The only proper result consistent with the express language of Section 7403(c) is to defer to the discretion of the District Court. Here, the District Court did not order foreclosure. Its decision should not be disturbed absent an abuse of discretion; and no showing of abuse is even attempted by the government.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Appendix

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglect or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be in a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) FILING. — In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For the purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.

(b) PARTIES. — All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) ADJUDICATION AND DECREE. — The court shall, after the parties have been duly notified for the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy the first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary or his delegate directs.

APPENDIX B

1843 Laws of Republic of Texas, An Act to Amend the Probate Law §§ 1, 2, at 14, 2 H. Gammel, Laws of Texas 1623 (1898):

Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That hereafter, when any person shall die intestate, or shall not expressly forbid it by will, the same amount of property and the same kind — if so much belong to the estate in kind — that is exempt from sale under fieri facias, or execution, by an act approved twenty fifth January, one thousand eight hundred and thirty nine, entitled "an act to exempt certain property therein named from execution", be, and the same is hereby declared to be exempt from sale by order from any probate Court.

Sec. 2. Be it further enacted, That when an inventory is and effect belonging to a succession, the Judge thereof shall made out and returned to the Probate Court, of the property set apart the property and articles as contemplated in the preceding section, for the sole use and benefit of the widow and children of the deceased.

APPENDIX C

Vernon's Anno. Constitution of the State of Texas (Vernon 1955) and (Vernon Supp. 1982):

ARTICLE XVI

GENERAL PROVISIONS

§ 50. [as amended Nov. 6, 1973] *Homestead; protection from forced sale; mortgages, trust deed and liens*

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchased money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner of claimant of the property claimed as a homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase or money therefor, or improvements made thereon, as hereinabove provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

§ 51. [amended Nov. 3, 1970; Nov. 6, 1973] *Amount and value of homestead; uses*

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time

of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

§ 52. *Descent and distribution of homestead; restrictions on partition*

On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

APPENDIX D

H.R. Rep. No. 2818, 74th Cong., 2d Sess. 7 (1936):

Section 203 amends section 3207 of the Revised Statutes so as to give the Government an opportunity to secure a determination of tax liability of a taxpayer in a court of equity, and at the same time obtain appropriate means of satisfying that liability, without resorting to the drastic remedy of distraining upon the personal property of the delinquent taxpayer; and selling such property in satisfaction of the amount of tax assessed. In its present form section 3207 of the Revised Statutes provides that in any case where there has been a refusal or neglect to pay any tax and it has become necessary to seize and sell real estate to satisfy the same, the Commissioner of Internal Revenue may refer such case to the Department of Justice with a recommendation for the filing of a suit in equity to enforce the lien of the United States for tax upon such real estate. Although section 1122(b) of the Revenue Act of 1926, as reenacted in section 617(b) of the Revenue Act of 1928, vests the district courts of the United States with such jurisdiction as may be necessary or appropriate for the enforcement of the internal-revenue laws, it has been specifically held that such courts have no jurisdiction to enforce a lien for tax against personal property by a proceeding in equity, since the statutory authority for the enforcement of tax liens deals only with real estate. It has been held that the remedy to distrain and sell property is adequate in the case of personal property. While it is true that this remedy is adequate, nevertheless there are many situations where resort to such remedy would be drastic and would cause considerable hardship to parties interested in the taxpayer proceeded against. For example, a holding company may have assets consisting of stocks, bonds, and other securities of operating companies, the operations of which may take place in many different parts of the country. To seize such securities in a distraint proceeding and to sell them would have a serious effect on the company itself, since it might lead to a change in management. Such a change

might well affect not only the employees of the operating companies, but would have a serious effect upon consumers. Moreover, the sale of large blocks of securities would tend to depress prices to a great extent, so that prices realized therefrom would be grossly disproportionate to their real value and the value of securities held by others considerably diminished. It should be noted also that when distraint is resorted to, there is no opportunity for a judicial determination of the tax liability of the taxpayer. It is, therefore, proposed by section 203 to enlarge the scope of section 3207 of the Revised Statutes so as to permit the United States to enforce its lien for tax against personal property by filing a suit in equity. The foreclosing of the Government's lien for tax in the manner, with the appointment of a receiver in proper cases, would permit the interests of all parties to be conserved and would provide for an orderly and equitable disposition of the Government's claim for tax. Since suits are now pending in which Government's authority to enforce the lien for tax against personal property in equity has been challenged, subsection (b) of section 203 would permit such suits to be continued in accordance with the provisions of section 3207 of the Revised Statutes.

Respondent's Brief

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SUPREME COURT, U.S.
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NO. 81-1476

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

PETITIONER

V.

JOERENE INGRAM AND
LAUREL A. BATES, TRUSTEE,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service can compel the District Court to enforce a federal tax lien of a delinquent taxpayer by foreclosing on the homestead estate of the delinquent taxpayer's ex-spouse who is an "innocent spouse" as defined in Section 6013(e) of the Internal Revenue Code of 1954 (26U.S.C.).
2. Whether the District Court can enforce such a federal tax lien in light of the existence of a state homestead law which exempts such real property from a forced sale when maintained by the innocent spouse, and which characterizes a homestead interest as an estate in land.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 81-1476

UNITED STATES OF AMERICA, Petitioner

V.

JOERENE INGRAM and
LAUREL A. BATES, TRUSTEE, Respondents

BRIEF FOR RESPONDENTS

STATEMENT

During their marriage, Donald and respondent Joerene Ingram acquired as community property, a residence located in Dallas, Texas, and claimed this property as their homestead under Texas law. In 1972 and 1973, the Internal

Revenue Service made assessments against Donald Ingram under Section 6672 of the Code relating to unpaid taxes withheld from employees' wages of the Dallas Auto Damage Appraisers, Inc., of which Donald Ingram was president. The tax liabilities related to the first quarter of 1971 through the second quarter of 1972. After payments on accounts of these liabilities were made, there remained unpaid $9,330.51, plus interest. In addition, in 1973, an assessment was made in the amount of $283.33, plus interest, against Donald and Joerene Ingram relating to their joint income tax liability for 1971. This amount remains unpaid. Respondent Joerene Ingram concedes that she owes this money, and has placed the same in Escrow. A copy of the papers that created the Escrow are attached hereto as Exhibit "A" and incorporated herein by reference.

On March 19, 1975, at which time the Ingrams were seeking divorce, their residence was destroyed by fire. In connection with their divorce proceedings, they entered into a property settlement agreement in which they agreed that Donald would convey his interest in the real property to respondent. After the property was conveyed to Laurel Bates, as trustee for respondent, attempts to sell the property failed. Respondent also received notice from the City of Dallas Department of Housing and Urban Rehabilitation that unless she complied with local ordinances, the remains of the residence would be demolished. Following a hearing notice requiring demolition was given. Respondent and Laurel Bates thereupon instituted this action in state court to quiet title to the property, to remove the liens that encumbered it, and to

enjoin demolition of the improvements located on the property.

The suit was removed to the United States District Court for the Northern District of Texas. Thereafter, the United States filed a counterclaim against respondent and Donald Ingram, who was added as a defendant, seeking foreclosure of its tax liens for the sole liability of Donald Ingram for unpaid withholding taxes and for the joint liability of Donald and Joerene Ingram for unpaid income taxes. Respondent sought summary judgment urging that the property was insulated from creditors' claims because it was her homestead. Pursuant to a stipulation of the parties, the property was sold and the proceeds (approximately $16,250) were deposited into the registry of the district court, pending the outcome of the suit. The government opposed

respondent's motion for summary judgment on the ground that there was a material question of fact concerning whether she had abandoned the homestead. In addition, the government filed a cross-motion for summary judgment on its counterclaim on the ground that the homestead exemption was ineffective against the federal tax liens. The district court granted the government's motion for summary judgment.

The court of appeals reversed holding that if only one spouse is liable for the federal taxes for which the assessment was made and the lien arose, then the question whether the federal government may execute that lien on homestead property of the taxpayer and his or her nontaxpayer spouse depends upon the nature of the homestead interest under state law.

In our case the state law confers a present property right to a person

possessing a homestead interest, and the government's lien may not be foreclosed for as long as the nontaxpayer spouse, the respondent herein, maintains her homestead interest under state law. United States v. Rogers, slip opinion page 8743, 649 F.2d at 1117.

SUMMARY OF ARGUMENT

A. Respondent's homestead interest is a separate vested life estate, not merely an exemption from creditors, and therefore the tax lien against the respondent's ex-husband should not and may not be enforced against her homestead interest.

B. The government's undertaking to foreclose its federal tax lien on respondent's homestead interest was vexacious in that respondent's homestead interest extends to at least one half of the subject property if not in fact to the entire property.

ARGUMENT

There is hardly a stronger, more consistently upheld principle of Texas law than that a family homestead is protected from forced sale for debts or from the unilateral sale by either spouse. The current Texas statutory law is contained in Section 5.81 of the Texas Family Code:

> Whether the homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber it without the joinder of the other spouse except as provided in Section 5.82, 5.83, or 5.85 of this code or by other rules of law.

This provision, along with various other statutes of Texas, is based upon the Constitution of Texas, Article 16, Section 50:

> Sec. 50. The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereon, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements there....nor may the owner or

> claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinabove provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void....(Adopted Nov. 6, 1973. Previous version was the same, except that it did not include single persons.)

A provision protecting the family homestead, the first such provision in the world, appeared in the Texas Constitution of 1845, adopted at the time of admission to the Republic of Texas to the Union. The original provisions have subsequently been strengthened and enlarged, and the courts of Texas have consistently upheld the provisions as valid.

The Supreme Court in Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277 (1960), held (at page 1280):

> Where the federal government asserts its tax lien, is whether and to what extent the taxpayer has "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that "in the application of a federal revenue act, state law controls in determing the nature of the legal interest which the taxpayer had in the property * * * * sought to be reached by the statute." Morgan v. Commissioner, 309 U.S. 78, 60 S.Ct. 424, 426, 84 L.Ed. 585. Thus, as we held only two Terms ago, Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law ****." United States v. Bess, 357 U.S. 51,55, 78 S.Ct. 1054, 1057, 2 L.Ed.2d 1135....This conflict should not be resolved by this Court, but by the highest court of the State of New York....(Emphasis added)

The Supreme Court having thus enunciated the law, it would appear that the Government should be bound thereby. And the law of Texas is set out in the Texas Constitution and statutes and has been clearly and concisely construed by the

highest court of the State. This "law" is, quite simply, that a spouse has an estate in land which cannot be sold, conveyed, or encumbered without consent of both spouses. Any attempt to do so is void. Paddock v. Siemoneit, 218 S.W.2d 428 (Tex.,1949). See also Morgan v. Moynahan, 86 F.Supp. 522 (1949). Both cases held that the tax lien may have attached to the taxpayer-spouse's interest in the homestead, but the vested interest in the nontaxpayer-spouse could not be disturbed by levy and sale of property. Whatever the underlying title to the property, Donald Ingram's interest in it was one which he could neither sell, convey nor encumber without the consent of Joerene Ingram. Since the property was community, Donald Ingram had naked title to an undivided one-half, but he could not sell it, he could not convey it, and he could not encumber it. The

Government's tax lien, according to Aquilino, attached only to what Donald Ingram had. In other words, in Texas, the "bundle of rights" includes the "homestead right" which overrides and limits any other property interest in the husband and wife.

It has been held that when the homestead is a mere exemption from creditors rather than a vested estate, a foreclosure of the federal tax lien under Sec. 7403 of the Code against the joint interest of a nondelinquent spouse may be proper. United States v. Heffron, 331 F.2d 657 (9th Cir.,1947), cert. denied, 331 U.S. 831 (1947); Shaw v. United States, 331 F.2d 493 (9th Cir.,1964). Respondent did not have a mere exemption from creditors under Sections 50, 51, and 53 of Article 16 of the Texas Constitution, but instead, upon acquisition of her homestead prior to

1971 was vested with an estate in land for her life. This vested estate was distinctly separate and apart from her husband's homestead estate and extends to the whole of the property for as long as she uses the property for her homestead. Woods v. Alvarado State Bank, 118 Tex. 586, 19 S.W.2d 35 (1929); Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428 (1949); Evans v. Mills, (5th Cir.,1933); Sargeant v. Sargeant, 15 S.W.2d 589 (Tex., 1929); Hargandine v. Whitfield, 71 Tex. 482, 9 S.W. 475 (1888); Rancho Oil Co. v. Powell, 142 S.W.2d 960 (1943). The Supreme Court of Texas in Woods directly addressed the question of whether the provisions of Sections 50, 51, and 52 of Article 16 of the Texas Constitution created only an exemption or a separate life estate for both the husband and wife

upon the acquisition of the homestead. In concluding that a separate, vested life estate in each spouse was created, the Court summarized the nature of the homestead:

> In view of our constitutional and statutory provisions concerning homestead rights we have concluded that in this state the homestead is to be regarded as an estate created not only for the protection of the family as a whole, but for the units of the family...as distinguished from a mere privilege accorded the head of the family....19 S.W.2d at 36 (emphasis added).

The Court continued:

> Since the homestead right is an estate in land, it follows that the holder of the homestead estate cannot be divested of his right except by alienation or abandonment or by some other character of process which would divest him of any other estate.... We think the homestead provisions of our Constitution and statutes show a purpose not only to protect the family as a whole. In plain terms, the Constitution and laws protect first the husband, wife, and children jointly or as a family; second, they protect the surviving husband; third, they protect the surviving wife.... 19 S.W.2d at 38 (emphasis added).

Finally, the Court addressed the question of when the homestead terminates:

> (S)ince the estate is created by the Constitution without limit as to its duration, we are not authorized to say when the estate shall terminate, except it may of course cease by alienation, abandonment or by laws such as apply to the divestiture of other estates. Id.

These principles were affirmed more recently by the Texas Supreme Court in Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428 (1949), a case squarely in point with the instant case. There, the Government intervened in a state court action to foreclose its tax lien against the homestead of the wife. The lien had arisen solely as a result of a tax assessment against the husband during marriage. The Court relied on Woods v. Alvarado State Bank and held, in regard to the wife's homestead:

> The wife has a vested estate in land of which she cannot be divested during her life except by abandonment or a voluntary conveyance in the manner prescribed by law....(The) district court erred in decreeing a foreclosure of the lien on the homestead as against Mrs. Siemoneit.

218 S.W.2d at 436.

As early as 1896, the Texas Supreme Court in Stallings v. Hullum, 89 Tex. 431, 35 S.W.2 (1896), recognized the separateness of the estate of each spouse in the homestead when it said:

> The alienation of the homestead by a married man without the consent of the wife, evidenced in the manner required by law, being prohibited, his attempted conveyance without her joining in the deed is void, insofar as it in any manner affects her interests. The mere privilege of possession and enjoyment is not the measure of her right in the homestead.... It is not practicable to carve out her interest in the property, and it is our opinion that the framers of the constitution never intended that this should be done. 35 S.W. at 3.

Finally, this Court has recognized in Evans v. Mills, 67 F2d 840 (5th Cir.,1933) that:

> A homestead interest in Texas is not, as in some states, a mere exemption. It is a title in the land of which, according to the settled public policy of the state, the owner may not be deprived except by abandonment or by his conveyance executed as required by statute. Stallings v. Hullum, 89 Tex. 431, 35 S.W.2; Woods v. Alvarado State Bank, 118 Tex. 586, 19 S.W.2d 35.

Though the laws of other States and decisions pertaining thereto are not conclusive as to Texas law, it is illuminating to look at another case where the Tenth Circuit held precisely what Respondents urge. In United States v. Hershberger, 475, F.2d 677 (10th Cir., 1973), the Government pressed the same arguments as urged here. The Tenth Circuit, looking to Kansas statutory law and court decisions, approved the rule that "a wife is granted an indivisible and vested interest in homestead property, and one which cannot be subjected to levy and sale for the satisfaction of the Federal tax liability of the husband." The Kansas homestead provisions are essentially similar to those in Texas, though, of course, Kansas is not a community property state, which tends to make Hershberger even more

persuasive here. There the wife had no actual ownership (it was the husband's) but she had an estate in the property which could not be levied on and sold to satisfy her husband's federal tax liens.

The position urged here is neither new nor undecided. The Supreme Court of the United States has consistently, and recently, "held that the extent of the tax debtor's interest in the property is determined by state law, and that the lien cannot attach when the debtor has no interest. Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960); United States v. Durham Lumber Co., 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960)." Slodov v. United States 98 S.Ct. 1778, fn. 19 at 1790 (1978). "(T)he Code afford IRS several means to collect back taxes, including levy, distraint, and sale. But IRS is not

given the power to levy on property beyond the extent of the taxpayer's interest in the property." (Emphasis added). 98 S.Ct. at 1790.

The Government, in its brief, cited several joint liability (both husband and wife liable) cases, as well as those involving only one of the spouses.

(1) Joint Liability. Respondents concede that where there is joint liability, the homestead estate can be reached. On a purely theoretical basis, this is not inconsistent with Respondents' position nor with Texas law. Since both husband and wife are liable, and since both have homestead estates, it is not difficult to reach the conclusion that their joint liability is, in effect, joint alienation of their homestead interest; i.e., a presumed consent of each spouse which is consistent with Texas law.

Cases cited by the Government which fall in the "joint liability" category are:

(a) United States v. Mitchell, 403 U.S. 190(1971);

(b) United States v. Estes, 450 F.2d 62 (5th Cir.,1971);

(c) United States v. Scofield, 132 F.2d (5th Cir.,1940).

(2) Single Liability. Cases cited by the Government which are "single liability" cases involving the tax liability of only one spouse are:

(a) United States v. Hershberger, 475 F.2d 672 (10th Cir.,1973);

(b) United States v. Overman, 424 F.2d 1148 (9th Cir.,1970);

(c) Broday v. United States, 455 F.2d 1097 (5th Cir.,1972);

(d) In re Ackerman, 424 F.2d 1148 (9th Cir.,1970);

(e) Weitzner v. United States, 309 F.2d 45 (5th Cir.,1962),cert.denied, 372 U.S. 913 (1963);

(f) Jones v. Kemp, 144 F.2d 478 (10th Cir.,1944).

Essentially the same facts were involved in Broday, Overman, and Ackerman. All involved the antenuptial tax liability of one of the spouses. The Government, after marriage, levied on non-homestead community property to satisfy the tax lien. In each case, a state statute provided that community property was not available to satisfy the premarital debts of either spouse. In each case, the court held that, since the delinquent taxpayer had an undivided one-half interest in the property, the Government's lien attached to such interest, and once it attached, a state statute regulating the rights of creditors could not stand between the Government's

levy and the delinquent taxpayer's property. In all three cases, the Government's recovery was limited to the share of the delinquent taxpayer.

Weitzner v. United States, involved circumstances quite similar to Hershberger and to the present case. In Weitzner, the husband and wife bought property in Florida, in 1946, which became their homestead. Federal tax assessments were made against the husband (only) and a notice of tax lien was filed in 1954. After the husband died in 1956, the Government sought to foreclose its lien against the property. The widow asserted that she had acquired a vested property interest in the property under Florida law when she and her husband had acquired it in 1946, that this was an estate separate and apart from her husband's title, and that it could not be

attached for the tax obligations of her husband. This Court stated:

> The resolution of this issue may depend upon whether there is involved a single interest of the taxpayer who is subject to tax liability, or whether both spouses have an interest while only one is under a tax liability.... If it is determined that a wife does not have, during the lifetime of her husband, a property right in a homestead where the title is in his name alone, we need proceed no further and the Government should prevail. 309 F.2d at 47-47. (Emphasis added).

This Court then looked to Florida law and decided that, in Florida, Mrs. Weitzner did not have any vested property rights, title or interest in the homestead during the life of her husband. Respondents find no disagreement between the holding in this case and that in Hershberger nor with the position here urged by Respondents. The decisions in both Weitzner and Hershberger were based upon the federal court's review of the applicable state law, as determined in the applicable

state, and the laws of Kansas and Florida are not the same on this point. Had the Weitzners lived in Kansas or in Texas, where the spouse does have a vested property interest in the homestead, we are confident that the result in Weitzner v. United States would have been different.

The Government relies heavily upon the decision in Shambaugh v. Scofield, 132 F.2d 345 (5th Cir.,1942). However, the only decision reached in Shambaugh was that when both spouses are jointly liable for federal income taxes, the homestead provisions under Texas law will not prevent foreclosure. As stated above, Respondents do not disagree that this is, indeed, the correct interpretation of Texas law where both spouses are liable and the federal tax lien has attached to the homestead property rights of both spouses. The situation now before the

Court is different. Here, the federal tax lien has not attached to Joerene Ingram's homestead property interest (which was acquired prior to the time the federal tax lien arose and will continue until she decides to abandon her homestead). Her homestead interest was and is separate and apart, indivisible from any interest her husband had in the property. She was not liable for the tax and her homestead cannot be sold to satisfy the Government's lien against her former husband.

Carter v. United States does involve somewhat similar facts to the fact situation here, but the holding in the case is more helpful to Respondents than to the Government. In Carter, the question, decided under Louisiana law, was whether the Government could seize and sell real property owned jointly by the husband and wife to satisfy the tax liability of the

husband. This Court indeed found, following decisions of the Louisiana Supreme Court, that the Louisiana homestead provision was not effective against the federal tax lien. However, the Court further held that since the wife owned an undivided one-half interest separate and apart from her husband, the Government could not seize and sell it. Texas courts have decided the precise issue involved, and those decisions should be determinative and binding upon this Court. The Supreme Court has allowed federal courts to decide state law questions where there is no clearly established state law or decisions. Propper v. Clark, 337 U.S. 472, 69 S.Ct. 1333 (1949); Markham v. Allen, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed.256 (1946). But it has also required the federal court to submit the question to the state court for determination. See,

e.g. City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 62 S.Ct.986 (1942). Despite the Government's desire to create a standard federal property law to further a uniformity of liability, determination of property rights remains, under our form of government, a state matter. "[A] federal decisional law in this field displacing state statutes as determinative of liability would be a sharp break with the past. Federal courts, in cases where the Government seeks to collect unpaid taxes from persons other than the defaulting taxpayer, have applied state statutes ...." C.I.R. v. Stern, 357 U.S. 39, 78 S.Ct. 1047 (1958). Stern involved Kentucky law and the tax liability of a deceased husband. The Government sought to recover from the widow as a transferee of life insurance proceeds. In denying the Government's claim, the

Supreme Court said:

> The Court of Appeals held in this case that under the applicable Kentucky law, the beneficiary of a life insurance policy is not liable to the insured's creditors, at least where, as here, the premiums have not been paid in fraud of creditors [citations omitted], and that therefore no liability of the respondent exists under state law to any creditor, including the Government. The parties do not contest this construction of local law.
>
> The Government, however, argues in its brief, "Just as in the situation where a tax lien has attached, it is held that state law may not destroy that lien, so here, where a tax liability is imposed by Congress, the state may not provide exemptions." We agree that state law may not destroy a tax lien which has attached in the insured's lifetime.... We might also agree that a state may not provide exemptions from a tax liability imposed by Congress. The fallacy in the Government's argument is in the premise that Congress has imposed a tax liability against the beneficiary. We have concluded that Congress has not seen fit to define that liability and that none exists except such as imposed by state law. Thus there is no problem here of giving effect to state exemption provisions when federal law imposes such liability. The Government's substantive rights in this case are precisely those which other creditors would have under Kentucky law. The respondent is not liable to the Government because Kentucky law imposes no

> liability against respondent in favor of Dr. Stern's other creditors. 78 S.Ct. at 1051.

The present case is substantially similar. The Government's tax lien may have attached to Donald Ingram's homestead estate, though Stern would indicate otherwise, but it could not attach to Joerene Ingram's. State law does not give any creditor a right of any sort against her homestead, and Stern says the Government has no better right than any other creditor.

As illustrated above, Respondent Joerene Ingram's homestead estate is involved in this matter. It is not subject to foreclosure for her ex-husband's tax liability arising from his derivative liability under Section 6672 of the Internal Revenue Code of 1954. Despite the Government's assertion that the amounts sought to be collected are merely

"taxes", they are actually penalties as that term is generally understood.

While it is undisputed that Respondents homestead estate is, at least a one-half interest in the land, there is, however, a question as to the one-half interest formally owned by Donald S. Ingram. Respondents contend that Joerene Ingram is an "innocent spouse" as defined in Section 6013(e) of the Internal Revenue Code of 1954 (26 U.S.C.). It is further suggested that the clear intention of the Congress, in providing penalties for nonpayment of taxes, was to punish those persons responsible for the nonpayment. All of the "tax" sought to be recovered by the Government in this matter is penalty. Furthermore, all of the unpaid withholding and/or social security taxes which provided the basis for the penalties assessed by the Commissioner of the Internal

Revenue have long since been paid, leaving only the penalties. These penalties were properly assessed against Donald S. Ingram, and not against his "innocent spouse," Joerene Ingram. To allow the Government to foreclose on Respondent's property, awarded to her as part of a divorce settlement, in order to collect the penalty assessed against Donald S. Ingram would be a gross injustice, would make a mockery of the Congressional intent to punish wrongdoers and not to punish innocent persons and would have the effect of letting the real miscreant in this case (Donald S. Ingram) escape without paying his penalty. It is noted that the unpaid withholding and social security taxes were from a corporation, and that the penalties were assessed against Donald S. Ingram strictly as a "person responsible." It has been held that:

> The question of who is a "responsible person" liable for a penalty assessment under Section 6672 is a recurring one that has produced much litigation. It is essentially a factual issue (citations omitted). Barrett v. United States, 580 F.2d 449 (Ct. Cl.,1978).

Moreover, in Busse v. United States, 542 F.2d 421 (7th Cir.,1976), the court held that the "innocent spouse" of a transferee was not entitled to file a refund suit under Section 1346(a)(1) of the Internal Revenue Code, since this remedy was limited to the taxpayer. Since the former husband in Busse was the corporate officer held liable, and against whom the tax/penalty was assessed, the fact that the wife had paid the tax to clear the title to her property (awarded to her in a divorce) did not entitle her to a refund suit. 542 F.2d 425. "Other remedies are available to contest a tax lien, including a suit to quiet title

under 28 U.S.C. Sec. 2410, and, as noted above, if the government attempts to enforce the lien by levy, an action challenging the wrongful levy under 28 U.S.C. Sec. 7426...." 542 F.2d 425.

Therefore, it is obvious that Donald Ingram alone is liable for these taxes and penalties, and that by virtue of the Texas homestead laws, the "innocent spouse" Joerene Ingram and her property are exempt from her ex-husband's tax liabilities.

In addition to the above argument, the Respondent hereby adopts the brief of the Respondent Lucille Mitzi Bosco Rogers and incorporates the same herein as if set out in full.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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By _____
L. LYNN ELLIOTT

Appendix

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 31 1979
JOSEPH McELROY, JR., CLERK
BY _____ Deputy

JOERENE INGRAM and LAUREL A. BATES, TRUSTEE, Plaintiffs v. CITY OF DALLAS DEPARTMENT OF HOUSING AND URBAN REHABILITATION; WHITE ROCK NATIONAL BANK; NORTHPARK NATIONAL BANK; E. M. KAHN & COMPANY; and UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), Defendants v. DONALD S. INGRAM, Additional Defendant on Counterclaim	CIVIL NO. CA-3-77-0798-C

JOINT MOTION AND STIPULATION FOR ORDER ALLOWING SALE OF PROPERTY IN QUIET TITLE ACTION AND SUBSTITUTION OF PROCEEDS FOR RES

COME NOW plaintiffs, Joerene Ingram and Laurel Bates, trustee, and defendants, City of Dallas Department of Housing and Urban Rehabilitation (City of Dallas), E. M. Kahn & Company, and the United States of America, and move this Court for an order allowing the sale of the property subject of this quiet title action and providing for the substitution of the proceeds for the res in this proceeding and, in support of their motion, stipulate as follows:

1. Movants are the only parties to this proceeding who have asserted a claim to the property subject of this proceeding.

2. This is a suit brought by and on behalf of Joerene Ingram and Laurel Bates, trustee, to quiet title to the following described property:

> Being lot 21 Block D/8118 of WHITE ROCK NORTH No. 10, an Addition in the City of Dallas, Texas, according to the map ttereof recorded in Volume 264, page 1245, of the Map Records of Dallas County, Texas.

3. Made parties to this action by plaintiffs are City of Dallas Department of Housing and Urban Rehabilitation; White Rock National Bank; Northpark National Bank, E. M. Kahn & Company, and the United States of America. The City of Dallas was made a party to this action to enjoin action being taken pursuant to a city ordinance to remove fire damaged improvements from the described property. The remaining defendants hold abstracted judgments or liens affecting title to said property.

4. For its answer, the City of Dallas denies plaintiffs' entitlement to an injunction, asserts nuisances and hazards exist on the subject property which are subject to removal in accordance with law, and asserts that all city ordinances and Texas laws have been complied with in ordering the removal. For its answer, White Rock Bank has disclaimed any interest in the subject property. For its answer, E. M. Kahn & Company aserts a judgment lien, abstracted on August 27, 1974, based on its judgment obtained August 13, 1974, in the amount of $389.42 and costs of $25.50 against Donald S. Ingram and Mrs. Donald S. Ingram. The defendant, Northpark Bank, has failed to answer or otherwise appear in these proceedings.

5. The United States of America has filed an answer and an amendment to answer to assert counterclaims, crossclaims, and to add an additional defendant on counterclaim. For its answer, the United States asserts valid federal tax liens in the amount of $28,007.49, filed November 28, 1972, in the name of Donald S. Ingram; in the amount of $2,285.39, filed January 15, 1973, in the name of Donald S. Ingram; and in the amount of $283.33 filed September 30, 1975, in the name of Donald S. and Joerene Ingram. It further asserts a notice of federal tax lien was filed on February 22, 1973, reflecting liabilities of $28,007.49 and $2,285.39. Finally, it denies the plaintiffs' entitlement to discharge and cancel its liens, and asserts its lien interest in the property subject of this

proceeding. For its counterclaims and crossclaims, the United States seeks foreclosure of its tax liens against the subject property and deficiency judgments against plaintiff, Joerene Ingram, and against additional defendant on counterclaim, Donald S. Ingram.

6. For his answer to the counterclaim of the United States, Donald S. Ingram has disclaimed any ownership in the above-described property.

7. The attorney for plaintiffs has received several bona fide offers to purchase the above-described property, the highest and best of which was an offer by Ernest T. Felts, Jr., to purchase the property for $16,250. A copy of said offer is attached hereto as Exhibit A.

8. The parties claiming an interest in subject property deem it to be in the best interest of all concerned to allow the sale of the property with the proceeds being placed in an interest-bearing account at a federally insured institution with the liens and claims of the parties attaching to such proceeds until a judgment becomes final which determines the parties' rights therein. The parties claiming lien rights will deliver appropriate certificates of lien discharge to Hexter-Fair Title Company at closing, allowing the purchaser to take the title free and clear of its present encumbrances. The purchaser would then bear the responsibility of bringing the property into compliance with the Dallas city ordinances and the City of Dallas could be dismissed from this action.

9. The parties agree and understand that their respective rights, claims, and priorities to the above-described property will be determined as if the subject property were still the res in controversy. If, upon a judgment becoming final herein, a party is determined to have a valid claim against the above-described property, such claim will be paid in full or in part, as the case may be, from the proceeds of sale.

10. The parties agree that Hexter-Fair Title Company should be appointed escrow agent to hold the proceeds of sale in escrow, pending final determination of this action and will deliver and pay over the proceeds only upon a final judgment or oder. The escrow agent will place the proceeds at interest in a federally insured institution and will charge no fee for acting as agent.

WHEREFORE, movants pray that the Court enter an order in accordance with their motion. An agreed form of order is attached for the Court's consideration.

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ATTORNEYS FOR UNITED STATES OF
AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JAN 31 1979
JOSEPH McELROY, JR., CLERK
BY B. Burkett Deputy

JOERENE INGRAM and LAUREL A. BATES, TRUSTEE, Plaintiffs v. CITY OF DALLAS DEPARTMENT OF HOUSING AND URBAN REHABILITATION; WHITE ROCK NATIONAL BANK; NORTHPARK NATIONAL BANK; E. M. KAHN & COMPANY; and UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), Defendants v. DONALD S. INGRAM, Additional Defendant on Counterclaim	CIVIL NO. CA-3-77-0798-C

O R D E R

Considering the foregoing joint motion and stipulation for an order allowing sale of property in this quiet title action and substitution of the proceeds for the res, and it appearing to the Court that same is in the best interest of justice, as well as the claiming parties, it is

ORDERED that the property subject of these proceedings be sold at private sale to Ernest T. Felts, Jr., for the sum of $16,250 cash, such property being described as follows:

> Being Lot 21 Block D/8118 of WHITE ROCK NORTH No. 10, an Addition in the City of Dallas, Texas, according to the map thereof recorded in Volume 264, page 1245, of the Map Records of Dallas County, Texas,

and that upon closing thereof the title and lien rights, if any, of all parties hereto shall be divested out of such real property and vested in the proceeds from the sale thereof, and such real property shall forever be free and clear of such claims and rights.

It is further ORDERED that Hexter-Fair Title Company be appointed escrow agent, without fee, of the proceeds of sale and such proceeds be placed in an interest-bearing institution, and

the liens and claims heretofore made with respect to the above-described real property shall attach in the same manner and with the same priority to such proceeds.

It is further ORDERED that the rights, claims, and priorities of the parties to the above-described real property will be determined, on subsequent proceedings before this Court, as if such property had not been sold.

It is finally ORDERED that, upon a judgment becoming final herein, any party determined to have a valid claim to the above-described real property shall have his claim satisfied in whole or in part, as the case may be, from the proceeds of sale only.

DONE this 31st day of Jan., 1979.

W.M. Taylor
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

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ATTORNEYS FOR UNITED STATES OF AMERICA

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 29 1982
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CLERK

No. 81-1476

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

LUCILLE MITZI BOSCO RODGERS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JOERENE INGRAM, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1476

UNITED STATES OF AMERICA, PETITIONER

v.

LUCILLE MITZI BOSCO RODGERS, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JOERENE INGRAM, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. The controlling issue in these cases is whether the rights accorded a delinquent taxpayer's spouse by state homestead laws preclude enforcement of a federal tax lien that attaches to the delinquent taxpayer's interest in the homestead property. Respondents agree (Rogers Br. 8-9) that a federal tax lien attaches to all property or interests in property of a delinquent taxpayer, that state law exemptions of property from the reach of private creditors are ineffective against the collection efforts of the federal government, and that a lien on a delinquent taxpayer's interest in property (including a homestead) may be foreclosed.[1] Respondents nevertheless contend that their

[1]Respondent Ingram adopts Rodgers' brief. See Ingram Br. 18.

respective property interests in homestead property preclude enforcement of a federal tax lien against their husbands' interest in the properties because Texas law characterizes their homestead interests as estates in land rather than exemptions. Respondents attempt to avoid the court of appeals' conclusion (Pet. App. 4a; see *id.* at 26a) that each of the delinquent taxpayers had an undivided one-half interest in the community property claimed as a homestead when the tax liens arose. As we understand it, respondents' primary argument is that the Texas homestead provisions established property rights for each of them that were "independent" of any homestead or other property interest their husbands might have enjoyed in the property. According to respondents, since their homestead rights were not "jointly" held with their husbands, any federal tax lien that attached to their husbands' homestead rights (or their husbands' interest in the community property claimed as a homestead) cannot be enforced in a manner that interferes with respondents' homestead rights.

Respondents' characterization of their property interests goes far beyond the rationale of the decision below that they purport to defend. Under the court of appeals' decision, each of the delinquent taxpayers had an undivided one-half interest in the property claimed as a homestead when the taxes were assessed and the liens arose. Hence, as the court properly observed (Pet. App. 8a), the federal tax liens "clearly attached" to the delinquent taxpayers' interests in the property. Whatever limitations the homestead statute placed on the taxpayers' rights, they nevertheless maintained substantial interests in the property.[2] Thus, at the

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[2]Insofar as respondents rely on the survivorship provisions set forth in Section 52 of the Texas Constitution art. 16, to show that their rights in the homestead were more extensive than their former husbands' rights, it must be remembered that at the time the tax liens attached the spouses in both *Rodgers* and *Ingram* were living. Any survivorship rights

time the liens here attached, respondents and their husbands were joint owners of the community property claimed as a homestead. Community property under the joint management and control of the spouses, such as the residential property involved in these cases, is liable for the debts incurred during the marriage by either spouse, as the tax debts were in these cases. Tex. Fam. Code Ann. § 5.61(c) (Vernon 1975); see *Cockerham* v. *Cockerham*, 527 S.W.2d 162, 169-171 (Tex. 1975); *Mulcahy* v. *United States*, 388 F.2d 300, 302 (5th Cir. 1968). The fact that the property rights of respondents and their spouses were defined in part by a homestead statute is of no consequence.

2. As we explained in our opening brief (Br. 40-43), under Section 7403(c) of the Internal Revenue Code of 1954 (26 U.S.C.), a federal district court has authority to direct the sale of any property in which a delinquent taxpayer has an interest and to divide the proceeds of the sale in accordance with the relative interests of the interested parties. Contrary to *Folsom* v. *United States*, 306 F.2d 361 (5th Cir. 1962) and *Carter* v. *United States*, 399 F.2d 340, 342 (5th Cir. 1968), upon which the court below relied (Pet. App. 14a-16a), the courts are not limited to ordering a sale of only the delinquent taxpayer's interest in the property. The restrictive interpretation of Section 7403(c) reflected in the decision below is inconsistent with the plain language of the statute, and it has been rejected by the four courts of appeals that have explicitly considered the scope of Section 7403(c) since *Folsom* was decided 20 years ago. See *United States* v. *Kocher*, 468 F.2d 503, 506-507 (2d Cir. 1972), cert. denied,

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were necessarily contingent. See *United States* v. *Bess*, 357 U.S. 51, 57 (1958). The rights respondent Rodgers subsequently acquired as a survivor were therefore subordinate to the federal tax liens. *Ibid.* Respondent Ingram is not a surviving spouse; her marriage was terminated by divorce. Accordingly, survivorship rights are immaterial in both cases.

411 U.S. 931 (1973); *United States* v. *Overman*, 424 F.2d 1142, 1146 (9th Cir. 1970); *Washington* v. *United States*, 402 F.2d 3, 6-7 (4th Cir. 1968), cert. denied, 402 U.S. 978 (1971); *United States* v. *Trilling*, 328 F.2d 699, 702-703 (7th Cir. 1964).

Respondents argue that by substituting the word "may" for the word "shall" when it amended the predecessor to Section 7403(c) in 1936 (Act of June 27, 1936, ch. 688, Section 802, 49 Stat. 1744), Congress intended to authorize the federal district courts to use their discretion in deciding whether valid and valuable federal tax liens should be enforced. But the legislative history of the provision provides no basis for respondents' interpretation of the change in language.

Section 7403 has its roots in Section 3207 of the Revised Statutes (1878 ed.).[3] Prior to 1936, Section 3207 of the Revised Statutes (as amended by the Act of Feb. 26, 1926, ch. 27, Section 1127, 44 Stat. 123) provided in relevant part that where "it has become necessary to seize and sell real estate" to satisfy delinquent taxes, "the Commissioner of Internal Revenue may direct a bill in chancery to be filed * * * to subject *any real estate* owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax" (emphasis supplied). All parties claiming an interest in the real property were to be joined in the proceeding and the court was to "determine the merits of all claims to and liens upon the real estate in question" (44 Stat. 123-124). Before 1936, Section 3207 (44 Stat. 124) further provided that "in all cases where a claim or interest of the United States therein is established, [the court] shall decree a sale of such real estate * * * and a distribution of the

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[3]Section 3207 of the Revised Statutes was based upon similar provisions of prior law. See Act of July 20, 1868, ch. 186, Section 106, 15 Stat. 167.

proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." Accordingly, the Commissioner of Internal Revenue was authorized to direct that a bill in chancery be filed to subject a taxpayer's interest in real property to the payment of his delinquent taxes and, if the Government established its claim, the court decreed sale of the real property and distribution of the proceeds in accordance with the interests of the parties. With respect to personal property, however, the Commissioner was authorized to employ only distraint (*i.e.*, the administrative seizure and sale of the taxpayer's personal property and interests in personal property). Rev. Stat. 3187 (1878 ed.), as amended by Act of June 2, 1924, ch. 234, Section 1016, 43 Stat. 343.

A proposal to amend Section 3207 to authorize the Commissioner to bring suit for the enforcement of tax liens against personal property and to enlarge the scope of remedies available in such suits by authorizing the use of receivers in appropriate cases was introduced. H.R. 12793, 74th Cong., 2d Sess. (1936); see H.R. Rep. No. 2818, 74th Cong., 2d Sess. 7-8 (1936). Congress recognized that Section 3207 limited the remedy of judicial foreclosure to cases involving the enforcement of tax liens against real property. *Id.* at 7. In some cases, however, the use of distraint against personal property, depressed the amount realized, to the detriment of both the government and the taxpayer, and others as well. *Ibid.*[4]

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[4]Thus, H.R. Rep. No. 2818, *supra*, at 7 states: "It has been held that the remedy to distrain and sell property is adequate in the case of personal property. While it is true that this remedy is adequate, nevertheless there are many situations where resort to such remedy would be drastic and would cause considerable hardship to parties interested in the taxpayer proceeded against. For example, a holding company may have assets consisting of stocks, bonds, and other securities of operating companies, the operations of w. ch may take place in many different

The proposed amendment was designed to authorize judicial foreclosure with respect to personal property and to authorize appointment of a receiver upon the request of the United States or the certification by the Commissioner of Internal Revenue that such appointment would be in the public interest. Section 203(a) of H.R. 12793 specifically authorized the Commissioner of Internal Revenue to "direct a bill in chancery to be filed, in a district court * * * to enforce the lien of the United States * * * upon any property and rights to property, whether real or personal * * *." See H.R. Rep. No. 2818, *supra*, at 14. The proposal required joinder of all parties "claiming any interest in the property" and further provided (*id.* at 15; emphasis added):

> in all cases where a claim or interest of the United States therein is established, [the court] *shall* decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. In any such proceeding, at the instance

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parts of the country. To seize such securities in a distraint proceeding and to sell them would have a serious effect on the company itself, since it might lead to a change in management. Such a change might well affect not only the employees of the operating companies, but would have a serious effect on consumers. Moreover, the sale of large blocks of securities would tend to depress prices to a great extent, so that prices realized therefrom would be grossly disproportionate to their real value and the value of securities held by others considerably diminished."

If Congress had intended enforcement of federal tax liens to depend upon the discretion of district courts, it is unlikely that it would have left intact the Commissioner's authority to seize and sell property administratively by the use of distraint. Indeed, the example cited in the House Report indicates that Congress believed the new authority with respect to judicial foreclosure would enable the government to collect taxes more effectively and increase the amount realized from the enforcement of the lien. See also H.R. Rep. No. 2818, *supra*, at 6.

> of the United States, the court *shall* appoint a receiver to enforce the lien, or, upon certification by the Commissioner of Internal Revenue during the pendency of such proceeding that it is in the public interest, *shall* appoint a receiver with all the powers of a receiver in equity.

Subsequently, the proposal was introduced by Senator Walsh as an amendment to the bill that was enacted as the Revenue Act of 1936 (H.R. 12395, 74th Cong., 2d Sess. (1936)). In the version introduced in the Senate, the word "may" was substituted for "shall." No explanation of the change was offered. Senator Walsh made only a brief comment with respect to the provision (80 Cong. Rec. 9072 (1936)):

> Mr. President, this amendment would permit the collector of internal revenue to apply to the United States courts, to file a petition in equity to enforce a lien for taxes where he has reason to believe the taxpayer will not be able to meet his obligations, and where the public interest will be prejudiced by resorting to the provisions in the present law, for distraint on the taxpayer's assets. In other words, it is an amendment more favorable to the taxpayer than are the provisions of present law.

Thus, Senator Walsh emphasized that the purpose of the amendment was to permit the government to seek foreclosure of its tax liens when, in its view, the public interest would be injured by resorting to distraint. The House Report and Senator Walsh's comment reflect Congress' intention to enlarge the collection remedies available to the government for the collection of federal taxes. See also S. Rep. No. 2156, 74th Cong., 2d Sess. 1-3 (1936).[5]

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[5]Given the absence of any discussion of the reasons for substituting the term "may" for the term "shall" when the provision was introduced as an amendment to H.R. 12395, it is difficult to ascribe any greater

Respondents' argument that Congress intended to authorize federal district courts to deny enforcement of valid and valuable federal tax liens in a foreclosure action, as a matter of discretion, finds no support in the legislative history. One of the principal objects of the amendment was to increase the collection of federal taxes by providing the government with a flexible collection remedy for the disposition of personal property in which the taxpayer had an interest. In enacting the predecessor of Section 7403(c), Congress sought to provide an effective means of collecting taxes that would permit the Commissioner to avoid the limitations of distraint. Accepting respondents' interpretation of the statute would defeat, rather than to further, the congressional purpose because judicial enforcement of tax liens against both real and personal property would depend upon the application of uncertain "equitable" considerations.[6]

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significance to the change than that Congress recognized it had specifically authorized sale of interests in property, sale of the entire property, and receivership. Employing the term "shall" with respect to each may have been perceived as confusing insofar as it could be read as directing contradictory requirements. In the circumstances presented here, sale of the property is the only practical alternative because there is no separate market for the fractional interests involved and, thus, sale of those interests would generate little revenue. A different case might be presented where there is an established market for the taxpayer's separate interest in the property, and the taxpayer acquired that interest separately in that market.

[6]Nor does the restructuring of the collection provisions into two separate subheadings in 1939 indicate that Congress intended to render foreclosure on real property discretionary with the courts. As the history surrounding that restructuring indicates, no substantive changes in existing law were intended. H.R. Rep. No. 6, 76th Cong., 1st Sess. 3 (1939); S. Rep. No. 20, 76th Cong., 1st Sess. 1 (1939).

CONCLUSION

For the reasons stated above and in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

Docket Sheet

RULE 19.4 Case

NO. 81-1476-CFX	TITLE United States, Petitioner v. Lucille Mitzi Bosco Rodgers, et al.

DOCKETED	COURT
February 5, 1982	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: William David Elliott
December 17, 1981	Applications for an extension of time to file petition for writ of certiorari, and order granting the same until 1/26/82, by White, J., 12/18/81. (A-539 and A-540)
January 15, 1982	Applications for a further extension of time to file petition for writ of certiorari, and order granting the same until 2/5/82, by White, J., 1/18/82. (A-539 and A-540)
February 5, 1982	Petition for writ of certiorari filed. (Record filed).
March 8, 1982	Brief for respondent Rodgers in opposition filed.
March 10, 1982	DISTRIBUTED. 3-26.
March 29, 1982	Petition GRANTED.

Apr. 7, 1982	Motion of the parties to dispense with printing the joint appendix filed.
Apr. 13, 1982	DISTRIBUTED. 4-16. (Above motion).
Apr. 19, 1982	The motion of the parites to dispense with printing the joint appendix is GRANTED.
May 11, 1982	Order extending time to file the Petitioner's brief on the merits until June 12, 1982.
June 15, 1982	Brief for petitioner, United States, filed.
June 18, 1982	Order extending time to file the respondent's brief on the merits until Aug. 13, 1982.
Aug. 12, 1982	Order further extending time to file the respondents' brief on the merits until Aug. 31, 1982. (ALL RESPONDENTS).
Aug. 14, 1982	Brief for respondents filed by Lucille Rogers, et al.
Sept. 2, 1982	Brief for respondents filed by Joerene Ingram and Laurel A. Bates filed.
Sept. 15, 1982	CIRCULATED.
Nov. 8, 1982	Motion of respondents for divided argument filed.
Nov. 15, 1982	The motion of respondents for divided argument is GRANTED.
Nov. 16, 1982	Motion of the Solicitor General to permit George W. Jones, Jr., Esquire, to present oral argument pro hac vice filed.
Nov. 29, 1982	The motion of the Solicitor General to permit George W. Jones, Jr., Esquire, to present oral argument pro hac vice is GRANTED.

(Over)

81-1476

Title

No.

DATE	PROCEEDINGS AND ORDERS
	2nd case: United States, Petitioner v. Joerene Ingram, et al.
	REPLY
Nov. 29, 1982	Brief for the United States filed. (D).
Dec. 6, 1982	ARGUED.